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JAMES H. McKENNEY,

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1903.

RICHARD H. FIELD,
Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY.
} No. 201.

THE BARBER ASPHALT PAVING COMPANY,
Appellant,
vs.
RICHARD H. FIELD.
} No. 202.

STATEMENT AND BRIEF

FOR BARBER ASPHALT PAVING COMPANY,
RESPONDENT AND APPELLANT.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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Of Counsel.

18,797 and 18,798.

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STATEMENT.

THE NATURE OF THE SUIT:

These two causes are the cross appeals of complainant and defendant respectively from a decree in equity of the Circuit Court within the Western Division of the Western District of Missouri. The suit was instituted in that Court in the district of his residence by complainant, Richard H. Field, a citizen and resident of Kansas City, Missouri, against the Barber Asphalt Paving Company, a corporation, and a citizen and resident of the State of West Virginia, for the purpose of having adjudged invalid and canceled the liens, against certain city lots or tracts of land claimed by the complainant, of certain special tax bills, issued to the Paving Company by the City of Westport, a municipality of Missouri, lying immediately adjacent to Kansas City on the south, in part payment of the contract price of paving three certain streets, viz., Main street, Baltimore avenue and Wyandotte street, in that city.

The tax bills were issued after the completion of the pavements. Those issued in payment of the price of the work on Main street are dated October 5, 1897 (Transcript of Record, p. 309); those on Baltimore avenue and Wyandotte were dated November 18, 1897. (Transcript of Record, pp. 313, 329.) This suit was begun January 4, 1900. (Transcript of Record, p. 1.) The jurisdiction of the Federal Court was invoked by complainant upon the grounds of the alleged invasion of his rights under the Constitution and laws of the United States and of adverse citizenship.

Because the suit is one to remove a cloud from the title to real estate equity takes cognizance of the action. That such is the nature of the suit and the sole ground of equitable jurisdiction is apparent. The bill alleges complainant's ownership of the described lots; alleges that the special tax bills in questions are apparently valid liens on his lands but by reason of certain alleged facts are void. And to remove this cloud relief in equity is sought. The prayer of the bill *inter alia* is: "That the defendant be required to bring said tax bills into this court and cancel and remove the same as claims and clouds against the real estate aforesaid of your orator." (Transcript of Record, p. 6.) The decree of the Circuit Court as to the Wyandotte street special tax bills, which in that respect alone was favorable to complainant, recites: "That the defendant within sixty days bring the special tax bills aforesaid into this court and here cancel and remove the same as claims and clouds against the real estate aforesaid." (Transcript of Record, p. 24.)

FACTS RELATIVE TO JURISDICTION:

The complainant holds the legal title to certain of the lots described in his bill of complaint, against which the aggregate assessment evidenced by the special tax bills referred to is less than $2,000, namely, $1,783.22. The complainant claims an equitable interest in a fractional part of other lots, the legal title to which is vested by general warranty deed, duly executed and recorded in the recorder's office of the appropriate county, in Annie Camp Field. (Transcript of Record, p. 199.) He offered evidence tending to prove that he had an equitable claim to an undivided one-half interest in these lots, which evidence was objected to on the part of the Paving Company as being incompetent, irrelevant and immaterial. (Transcript of Record, pp. 201, 202, 203, 204.) One-half of the total assessment against the lots in which he claims an equitable interest amounts to $1,583.21. So that if we may add the amount of the assessment that would ratably be borne by the alleged equitable interest to the amount of the assessment against the lots to which complainant has the legal title, the jurisdictional amount is involved in this suit, otherwise it is not. The jurisdiction of the court was impeached by defendant's pleading. (Transcript of Record, p. 13.) The Circuit Court denied this contention of defendant; and that denial is assigned as one of the grounds of the Paving Company's appeal.

The Paving Company's contention is that because complainant claims an equitable interest in certain lots, the legal title to which it is admitted is vested in Annie Camp Field, he cannot add the amount of the assessment which would fall to his asserted equitable interest in the Annie Camp Field lots to the sum chargeable against the lots to which he holds the legal title in order to expand the dimensions of the cloud obscuring his legal title to the extent of the pecuniary value required to give the Circuit Court jurisdiction.

CHARTER REQUIREMENTS RELATIVE TO PAVING STREETS:

The method prescribed by the charter of the City of Westport, being the statutory charter for cities of the fourth class in Missouri, may be briefly summarized thus: (The law as enacted is to be found in the Laws of Missouri, 1895, page 65, *et seq.*, and is published in revision in the Revised Statutes of Missouri, 1899, Vol. 2, pp. 1402, 3 at the sections hereinafter cited.)

When the Board of Aldermen deem it necessary to pave any street, or any part thereof, within the limits of the city for which

a special tax is to be levied, the Board of Aldermen shall by resolution declare such work or improvement necessary to be done and cause such resolution to be published in some newspaper published in the city for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion in the publication of such resolution, file with the city clerk their protest against such improvement, then the Board of Aldermen shall have power to cause such improvement to be made, and to contract therefor and to levy a tax as herein provided; and the finding of the Board that a majority of such owners have not filed a protest shall be conclusive and final. Contracts shall be let to the lowest and best bidder upon the plans and specifications therefor filed by the city engineer with the city clerk; not less than one week's advertisement for bids being made in some newspaper published in the city. R. S. Mo., 1899, Sec. 5989.

An estimate of the cost of the work of paving shall be made by the city engineer or other proper officer, and submitted to the Board of Aldermen before any contract for such work is entered into; and no contract shall be entered into for such improvement at a price exceeding such estimate. R. S. Mo., 1899, Sec. 5985.

The cost of paving streets, or parts thereof, shall be levied as a special assessment upon all lots or pieces of ground on either side of such street, or part thereof, abutting thereon along the distance improved in proportion to the front foot. R. S. Mo., 1899, Sec. 5982.

The cost of paving squares and areas formed by the crossing and meeting of streets shall be levied as a special assessment against the block or square contiguous to each and pro rata against the lots or pieces of ground in such block or square abutting on the street improved. R. S. Mo., 1899, Sec. 5983.

The assessments made for paving all streets shall be known as special assessments for improvements, and shall be levied and collected as a special tax; and special tax bills shall issue therefor and be paid in the manner provided by ordinance; they may bear interest thirty days from date at the rate of eight per cent. per annum; and every such special tax shall be a lien against each lot or tract of land described in the same until the same is paid. R. S. Mo., 1899, Sec. 5984.

All tax bills issued for paving shall be assignable and collectible in an action brought in the name of the city to the use of the holder thereof, but the city shall not in any event be liable for any costs that may accrue in such action. Such special tax bills in any action thereon shall be *prima facie* evidence of the regularity of

the proceedings for such special assessment, of the validity of the bill, of the doing of the work, and of the furnishing of the materials charged for, and of the liability of the property to the charge stated in the bill. R. S. Mo., 1899, Sec. 5986.

Property owners have the right upon request to have such assessments made payable in three annual installments. R. S. Mo., Sec. 5987.

These sections of the charter law under review are printed in full as an Appendix to this brief.

The General Assembly of Missouri conformable to constitutional mandate (Mo. Const., Art. 9, Sec. 7) has provided by law for the organization and the classification of the cities of the state in four classes, and has defined the powers of each class by general laws. R. S. Mo., 1899, Vol. 2, Chap. 91, p. 1223.

The City of Westport is a municipality of about the same age as Kansas City; indeed in the early days its importance was greater than its more strenuous rival, for then Kansas City was known as Westport Landing. At the time of the happening of the events out of which this controversy arose, it existed as a city of the fourth class, under the laws of Missouri, and had its northern boundary coincident with the southern boundary of Kansas City: the center of Thirty-first street being the dividing line. The cities were consolidated, so that in law they became one municipality, as they had long been in fact, by a vote of the qualified voters of the city, taken on the 2nd of December, 1897. Grand avenue, or Main street as it is called where located in the limits of old Westport, is the main thoroughfare one hundred feet wide, extending in a north and south direction, through the eastern part of the business section of Kansas City to the eastern part of the business section of what was formerly Westport. Baltimore avenue is the street next west and parallel to Main street, and Wyandotte street is the street next west and parallel to Baltimore avenue. Wyandotte street runs through the business center of the old City of Westport. These three streets are common both to Kansas City and Westport, and may be said to be the central north and south streets of the twin cities. And along them at the locality under review are located some of the handsomest and most fashionable residences of Kansas City. (Transcript of Record, pp. 75-77.)

COMPLAINANT'S CONTENTIONS UPON HIS APPEAL:

The complainant's bill was amended three times and parts of it (owing to complainant's commendable consideration) have been

omitted in the printing. Its allegations material to complainant's appeal we deem to be the following:

(1) "That Sections 88 to 95, inclusive, of the act of the General Assembly of the State of Missouri aforesaid (the ones we have heretofore summarized and which we print as an appendix hereto), under which the tax bills in question are claimed by the defendant as liens upon complainant's real estate, deprive complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in the City of Westport, and take his property for the private use of said residents, and violate Section one of the Fourteenth Amendment to the Constitution of the United States." (Transcript of Record, p. 2.)

The contention of appellant under this allegation seems to be that Section 95 of said act, being Section 5898, R. S. Mo., 1899, which, in conferring power upon the Board of Aldermen of such cities to order street improvements to be paid for by special assessments against the abutting lands, requires that the Board first publish a resolution declaring such work or improvement necessary to be done, and cause that resolution to be published in some newspaper published in the city for two consecutive weeks, and further prescribes that "if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of such resolution, file with the city clerk their protest against said improvement, then the Board of Aldermen shall have the power to cause such improvement to be made, to contract therefor and to levy a tax as herein provided," is an unlawful discrimination against non-residents of the city. It cannot escape instant notice that this absence of a remonstrance by a majority of the resident owners affected by the contemplated improvement is by the legislative department of the state made a prerequisite to the exercise by the Board of Aldermen of the power of enacting any ordinance requiring a street to be paved. It is unquestioned upon this record that complainant, Richard H. Field, was a resident of Kansas City, which immediately adjoined the city of Westport, and that he lived in the vicinity of the lots in question; that he had actual knowledge of the preliminary steps taken to improve the streets upon which his lots abutted, for he, in testifying, said: "When I first learned they *were going* to pave Main street (the first one improved), and the contract had been actually let (May 17, 1897, Transcript of Record, p. 154), I met Mr. McGowan," etc. (Transcript of Record, p. 198); and referring to Wyandotte street, he said: "It was done very quickly, but *I had information it would* be done or had been done," etc. (Transcript of Record, p. 199);

that he had notice, by publication of the preliminary resolution declaring the improvement necessary, and advertisement for bids, that the work was contemplated and was in progress (Finding of Court, Transcript of Record, p. 518); and that he never remonstrated or attempted to remonstrate to the municipal authorities of Westport against the improvement of any of the streets in question.

(2) "Sixth. For the purpose of forestalling any remonstrance from the residents of the City of Westport owning property fronting on such pavements, before any plans or specifications for them or either of them were made and filed in said City of Westport, and before any resolution or ordinance ordering such streets or either of them to be paved were passed, the defendant circulated among such residents a petition in each case asking the Board of Aldermen of said City of Westport to cause such work to be done, and induced the said residents of the late City of Westport to sign said petition and to refrain from remonstrating against such improvements, by promises of rebates on the amount of tax bills to be issued against their property for said improvements, and by other favors to such residents upon the cost of such work, and thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the Board of Aldermen of said City of Westport, and the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same, or either of them, necessary to be done, but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the Board of Aldermen of the City of Westport, and the defendant's undue and illegal influence over the Board of Aldermen of said City of Westport." (Transcript of Record, pp. 3, 4.)

The petitions referred to in this allegation are petitions of common right or what may be designated as common law petitions. They are not petitions prescribed by the charter, nor are they a prerequisite to the exercise of the power of the legislative authorities of the city to enact ordinances to improve its streets. There is no evidence—not a scintilla—in the record tending to show any corrupt acts or conduct on the part of any person connected with the Paving Company, or the city government, in respect to these petitions or the improvement proceeding. The trial judge in his Findings said: "I have searched the record and find no evidence of corruption. * * I fail to find evidence that there was any sharing of profits with any of the aldermen, or of receiving by or offering rebates to any of the property owners." (Transcript of Record, p. 519.)

(3) "Ninth. That the defendant had the exclusive control

of the importation, sale and use of the genuine Trinidad Lake asphalt in and to the said City of Westport, at the times of the specification of the same by the City of Westport, for the three street pavements here in question." (Transcript of Record, p. 5.)

The proof adduced by complainant himself does not sustain this charge. (Transcript of Record, pp. 40, 113.) There were competitive bids on this identical work. (Transcript of Record, p. 88.) In the Findings of the trial court it is said: "He (complainant) contends that the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so." (Transcript of Record, p. 519.)

(4) "Tenth. That with a view to lessen and which tended to lessen full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the Board of Aldermen of said City of Westport, at the instigation of the defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should 'consist of a genuine Trinidad Lake asphalt pavement.'" (Transcript of Record, p. 5.)

There is no evidence tending to show that any other than legitimate arguments were used by, or on behalf of defendant, to induce the property owners to request, or the Board of Aldermen to adopt, Trinidad Lake asphalt as the matrix of the street pavements in question. Complainant's own proof establishes the fact that the people of Westport and Kansas City generally believed Trinidad Lake asphalt to be the most successful street paving material known. The durability and success of pavements laid with that material in Kansas City had been remarkable. The streets constructed of it there have endured in reasonably good condition without any repairs or expense to abutting property owners for a period of twelve or fifteen years.

Mr. J. C. Tate, agent of the Mastin estate, which was, concurrently with the complainant, contesting Westport tax bills, testified:

"Q. Now, these persons connected with the Barber Asphalt Paving Company represented to the property owners, did they not, that they had the best paving material known? A. Yes, sir.

"Q. Isn't it a matter of general belief among the people of Kansas City that they have the best paving material known? A. Well, that is a question I don't know about. Up to a few years ago (this deposition was given three years after the pavement in question was laid) it was thought they had decidedly the best mate-

rial, but recently I have heard the Gilsonite's spoke of in very high terms. * * *

"Q. Isn't it a fact that the Barber Asphalt Paving Company has laid 367,000 yards against the Gilson's 10,000? A. I don't know what the proportion was. I simply know that the Barber Company laid more pavement than any of the other asphalt companies." (Transcript of Record, p. 99.)

(5) "That the defendant, the city engineer, the Board of Aldermen, and Mayor of said City of Westport, conspiring, combining and contracting in restraint of trade and commerce among the several states, and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri, caused to be specified in the resolutions and ordinances of said city and contracts for the paving in question, that it should consist of a genuine Trinidad Lake asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the island of Trinidad, without the United States, and within the domain of another nation, and the defendant at and before the dates alleged in this bill monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation, sale and use of Trinidad Lake asphalt, whereby it had, and attempted to have, at the times here in question, the exclusive control of the importation, the sale and use of said asphalt, in and to the City of Westport, and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said City of Westport to specify genuine Trinidad Lake asphalt in its resolutions, ordinances and contracts for the pavements in question, it had monopolized and attempted to monopolize a part of the trade and commerce of the several states and with foreign nations, all in violation of the act of Congress contained in the act of July 2nd, 1890, 'to protect trade and commerce against unlawful restraints and monopolies.' And the said resolutions and ordinances of said City of Westport also violate the commerce clause of Section eight of Article one, of the Constitution of the United States." (Transcript of Record, p. 18.)

All the material allegations of complainant's original bill, and of the amendments thereto, were specifically denied by defendant. (Transcript of Record, pp. 7 to 14, 19 to 21.)

PROOF OF THE CONDITION OF THE THREE STREETS; WHY DEVELOPED:

In the eighth charge of complainant's bill (Transcript of Record, p. 4), the claim is made that neither of the three streets in question had been brought to the established grade before the defendant undertook to carry out its contracts to pave those streets, but that the cost of bringing *the streets to grade* (which cost under the charter is required to be paid out of the general revenue fund, R. S. Mo., 1899, Sec. 5980,) was unlawfully allowed to defendant and included in the tax bills in question as part of the cost of paving, by reason of which increased charge the assessments evidenced by the bills were alleged to be void. It will be observed that nowhere in the bill is it suggested or intimated that Wyandotte street or Main street had been previously covered with a rock macadam, which was the fact, or that the macadam was at the time the paving contract was enterprised in such condition that the action of the Board of Aldermen in ordering the roadway resurfaced with asphalt was unconscionable and confiscatory of property rights. In the proof relative to the condition of the surface of these streets, however, evidence which was directed to establish the fact that the streets were substantially at the established grade, so that no undue filling or excavation was required to enable the contractor to lay the street pavement at the established grade, it was developed that there was an old worn out macadam on Main street, so much worn out that the traffic from that street had been diverted to Wyandotte street (Transcript of Record, p. 402); and that Wyandotte street had been covered with an inferior macadam in 1892 (Transcript of Record, pp. 305, 389), more than five years before the asphalt pavement in question was laid on that street (Transcript of Record, pp. 305, 389); that the macadam was of an inferior quality (Transcript of Record, pp. 85, 283, 348); that the life of such macadam does not exceed eight years (Transcript of Record, p. 403); that the macadam on Wyandotte street had been worn down four or five inches (Transcript of Record, p. 402); that macadam was a discredited pavement and its use as a pavement for residence streets practically abandoned in both Kansas City and Westport; that in wet weather it was sloppy; and in dry weather the dust from it was annoying and destructive of household furniture and comfort (Transcript of Record, pp. 348, 283); that a majority of the owners of front feet of all the property on each one of these streets petitioned the municipal authorities of the city to have them repaved with asphalt; that the United States Circuit Court by its Receiver, Mr. Hugh Ward, had petitioned the municipal authorities likewise to pave these streets with asphalt (Transcript of Record, pp. 170, 146, 121); that by the unanimous vote of the Aldermen and approval of the Mayor the contracts had been entered into; that

neither complainant nor any person, whether a resident of the City of Westport or not, had submitted a single objection or word of remonstrance against the paving of either of the streets in question until the work had been satisfactorily done in full compliance with the terms of the contracts and specifications, and the guaranty thereof for a period of five years. Although the case was tried more than five years after the asphalt pavements in question were laid, the record contains no intimation that they were not at that time in a perfect and thoroughly satisfactory condition; and the proof shows that the pavements as laid will endure as substantial and desirable pavements for a term of ten years after the guaranty shall have expired.

EFFECTS OF THE PAVEMENTS:

Referring to asphalt pavements complainant testifying in his own behalf said: "Well, it is a good pavement." (Transcript of Record, p. 204.) His own witness, Mr. J. C. Tate, said: "I think Wyandotte street has been benefited considerably by the asphalt paving. Q. Wasn't it your belief that the value to be added to the unimproved property by making the improvement would be greater than the cost of the work? A. Yes, sir." (Transcript of Record, p. 95.)

One cannot read complainant's own testimony without being satisfied that the streets in question comprise one of the most choice residence localities in or about Kansas City. (Transcript of Record, pp. 205, 206.) Complainant himself conceded that fronting Wyandotte street along the distance improved there were fifty-two residences—more than on either of the other streets improved (Transcript of Record, p. 345)—and the testimony shows that the general improvement of that locality is remarkably rapid. (Transcript of Record, pp. 76, 77, 142, 266.) Every witness upon the stand who testified as to the pecuniary effect or value of the paving of these three streets, including Wyandotte street, gave it as his unqualified opinion that the adjacent lots were enhanced in value by reason of the construction of the pavement to the extent of about ten dollars a front foot, and more than the cost of the paving. Col. Phelps (Transcript, pp. 212, 215); Mr. Woods (Transcript of Record, p. 241); Mr. Crutcher (Transcript of Record, p. 258); Mr. Beedle (Transcript of Record, pp. 273, 274); Mr. Finlay (Transcript of Record, p. 288).

Mr. A. D. Beedle testified: "Q. You may state what the general effect on values in that vicinity has been of the improvement of these three streets as referred to in the pleadings? A. Why, the general effect in that locality has been to have the *very best*

residences erected there and occupied by the very best citizens of the city. Prior to the improvements we had very few of them and now we have them all along on Wyandotte, Baltimore and Main. * *

"I have known all that country for thirty years, Westport and the tract of ground between Westport and the city." (Transcript of Record, p. 274.)

It is true that upon these facts, about which there is indeed little or no controversy, the learned trial judge, Hon. Smith McPherson, of Red Oaks, Iowa, before whom the case was unexpectedly tried, held that because the municipal authorities of Westport ordained that Wyandotte street should be repaved with an asphalt pavement which was required to be laid on top of the macadam, using the old macadam as a base or foundation for the new surface (due allowance for the worth of the macadam base being made in the bidding for the work), their action in that respect was unreasonable and confiscatory of property rights and void, because, in his opinion, formed five years after the thing had been done, the improvement was not necessary. He declared the special tax bills issued in payment of the contract price of paving that street, the aggregate amount of the bills thereby affected being $31,908.00, to be void. He declined to impeach the bills issued in payment of the paving of Main street and Baltimore avenue. And because he denied complainant relief as to those two streets complainant has appealed; and because the court afforded complainant relief as to the special tax bills issued in payment of the Wyandotte street paving, and ordered those bills canceled and surrendered, the Paving Company has prosecuted its appeal in this cause.

ISSUES ON PAVING COMPANY'S APPEAL.

The issues raised by the appeal of the Barber Asphalt Paving Company, as indicated in its assignment of errors, are two, namely:

(1) The Circuit Court had no jurisdiction of the suit, because the matter in dispute is less than the sum or value of two thousand dollars.

(2) The Circuit Court erred in adjudging that the ordinance of the City of Westport, ordering an asphalt pavement to be laid upon Wyandotte street in that city, and the tax bills issued to the Paving Company in payment of the contract price of that work, were void on the ground that the asphalt pavement was unnecessary.

MOTION TO DISMISS PAVING COMPANY'S APPEAL.

In the case of Barber Asphalt Paving Company, appellant, vs. Richard H. Field, No. 202, the respondent, Richard H. Field, has heretofore filed a motion to dismiss the Paving Company's appeal for want of jurisdiction. The motion was submitted to this court upon printed briefs of the respective parties in support of, and against, the motion. Thereupon the court indicated that the motion would be held until the case was submitted upon the merits. For our suggestions against the motion we beg leave to refer, without further discussion of that subject, to the printed brief against the motion heretofore filed by us in behalf of the Barber Asphalt Paving Company.

ASSIGNMENT OF ERRORS.

The Barber Asphalt Paving Company specifies the errors relied upon in its appeal in case No. 202, of the Barber Asphalt Paving Company, appellant, vs. Richard H. Field, as follows:

I.

The appellant says the decree rendered and entered in this cause by the Circuit Court, insofar as it adjudged and decreed that said court had jurisdiction of this suit and that the amount in dispute is not less than two thousand dollars is erroneous and against the just rights of the appellant.

II.

The appellant says that the said decree, insofar as it adjudged and decreed that the resolution of the Board of Aldermen, the ordinance of the city of Westport, and the contract between the said city and the appellant for paving Wyandotte street in said city, and the special tax bills described in complainant's bill as having been issued to and held by the defendant for paving Wyandotte street in said city are null and void, is erroneous and against the just rights of the appellant.

A similar assignment of errors was made and filed by this appellant in the Circuit Court of the United States in and for the Western Division of the Western District of Missouri on December 18, 1902, immediately prior to the entering of the order allowing this appellant its appeal herein. (Transcript of Record, pp. 32 and 33.)

BRIEF.

I.

JURISDICTION.

The United States Circuit Court had no jurisdiction of this suit because the matter in dispute, exclusive of interests and costs, is less than two thousand dollars.

The facts pertinent to this contention are these: Complainant alleged in his bill that he was the owner of certain city lots, describing them, which lots will be referred to hereinafter as the lots to which complainant has the legal title, and an undivided one-half of certain other city lots, describing them, which lots will be referred to hereinafter as the lots in which complainant claims an equitable interest; and that the city of Westport had undertaken to assess each of these lots with a certain sum as a special tax to pay for paving the streets upon which the lots abutted; that such assessments were evidenced by special tax bills which were owned and held by the defendant. The amount of the assessment against each lot is stated in complainant's bill; from which it appears that the total assessment against the lots to which complainant has the legal title is Seventeen Hundred and Eighty-three Dollars, and the total assessment against the lots in which complainant claims an equitable interest is Fifteen Hundred and Eighty-three Dollars (Transcript of Record, pp. 1, 3). The bill does not allege that complainant has or that he ever had possession of this property. It does not specifically charge that complainant has any title legal or equitable to the lands, but is contented with the allegation that complainant is "*the owner* of the following described real estate," etc.

The defendant in its answer averred that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars. It admitted the ownership by the complainant of the certain lots to which complainant has the legal title, and denied that complainant owned a one-half interest, or any interest, in the lots as to which complainant avers his ownership of a one-half interest. The answer averred: "This defendant states that the complainant herein has stated and alleged in his said bill of complaint that he owns one-half interest in the lots hereinbefore described for the sole purpose of making it appear upon the face of the bill that this court had jurisdiction of the cause of action therein stated." (Transcript of Record, p. 13.)

Complainant's own proof was conclusive that the title to the lots in which the complainant claimed an equitable interest was duly vested by good and sufficient deed, duly acknowledged and recorded in the office of the Recorder of Deeds for Jackson County, Missouri, in Annie Camp Field. (Transcript of Record, pp. 199, 200, 201.) He knew this fact at the time his bill was prepared and filed. This proof did not come as a surprise to complainant. It was what he had in contemplation to support the allegation of his bill.

Our position is, that this is a suit in equity grounded upon the jurisdiction of equity courts to quiet title; that under the established principles of that judicature such suits can be maintained only by persons holding the legal title to real estate; that complainant cannot add to the amount of the alleged assessment against the lots to which he claims the legal title the proportionate amount of the assessment which would fall to his asserted equitable interest in the lots, the legal title to which is vested in Annie Camp Field, of which fact he was conscious at the time of drafting his bill of complaint, and thereby expand the dimensions of the cloud obscuring his title to the extent required to give the Circuit Court of the United States jurisdiction; that the complainant along with the rest of us is presumed to know the law; and that the allegations of his bill, in respect to the ownership of the lots in which he claims an equitable interest, is, for the purpose of determining the amount involved, to be construed as a fictitious and colorable claim, which will be disregarded by the court in determining the question of jurisdiction.

The statute relative to jurisdiction provides: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States," etc. U. S. Comp. Sts., 1901, p. 508, Sec. 629.

The act excludes from the jurisdiction of Federal Courts all causes involving rights which are not capable of a reduction to valuation in money. *Elgin* v. *Marshall*, 106 U. S., 578; *First National Bank* v. *Hughes*, 106 U. S., 523. Such as divorce, *Coswell* v *Coswell*, 120 Ill., 377; and the contest of an election to remove a county seat, *Smith* v. *Adams*, 130 U. S., 167.

It is stated in *Hicks* v. *Knost*, 94 Fed., 627, by Thompson, D. J.: "It is the policy of Congress to require all controversies where the amount involved is less than two thousand dollars to be

determined in state courts, notwithstanding they may involve federal questions, or the parties be of diverse citizenship."

It has been ruled by Adams, D. J., in the case of *Wheless* v. *City of St. Louis*, 96 Fed., 865, that owners of separate lots could not by joining in a bill of equity having for its object the cancellation of special tax bills, add the sums assessed against their several lots as a special tax under the state statute in question in this suit, so as to bring up the amount in dispute (the amount assessed against no one lot being $2,000), to that required by statute to give the court jurisdiction.

Complainant's bill appeals solely to the general equitable jurisdiction of the court to remove a cloud upon the title to real estate. It is a well settled rule of equity that this jurisdiction can be invoked only by the person holding the legal title to the land constituting the subject matter of the suit. He must have the title to cloud before his title can be clouded.

In *Kennedy* v. *Elliott*, 85 Fed., 832, it is stated by Hanford, D. J.: "Besides the objection that the issues in the pleadings are too narrow, there is an additional obstacle in the way of obtaining equitable relief, independently of the statute; for the complainants have not acquired legal titles to the land which they claim. They show only executory contracts to purchase from the State of Washington, whereby the state has covenanted to convey to each a particular tract, in consideration of full payments of the purchase price in annual installments, with interest. And if there is a controversy between the states of Oregon and Washington as to the location of their common boundary (the arguments assume that there is such a controversy between the two states), then, while that controversy remains undetermined, there is such uncertainty as to the validity of any title which the complainants can acquire from the State of Washington as to preclude them from establishing their rights conformably to the rules of procedure in courts of equity. If their titles were complete, as they can be made by the issuance of patents pursuant to their contracts with the State of Washington, the complainants would still be barred from suing in equity, independently of the statute, by the rule which requires a plaintiff in a bill to quiet title to show by incontestable evidence that he has the legal title. 1 Pom. Eq. Jur., Secs. 252, 253; *Holland* v. *Challen*, 110 U. S., 15-26; *Frost* v. *Spitley*, 121 U. S., 552-558; *Whitehead* v. *Shattuck*, 138 U. S., 146-156; *Wehrman* v. *Conklin*, 155 U. S., 314-333."

In *Patrick* v. *Isenhart*, 20 Fed., 339, it is said by Foster, D. J.:

"It is evident from the bill that it makes a case relievable in equity, but not a case for removing a cloud from the title. It seems that in order to obtain that relief the complainant must have the legal and equitable title, as also the possession. 'Those only who have a clear, legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' *Orton* v. *Smith,* 18 How., 265."

In *Morse* v. *South,* 80 Fed., 206, it is said by Barr, D. J.:

"The bill alleges that complainant and the heirs of J. W. South are tenants in common, and have a fee-simple title in the land in controversy, and the actual possession thereof. * * * The defendants, William Strong and the Marcum heirs and Duff, have answered, and have put in issue all of the material allegations of the bill, except that the commonwealth of Virginia patented to Thomas Franklin the 116,656 acres, as described in the bill. * * It will be seen that the issues thus made go to the title and the possession of the complainant, and also the claim of ownership by the defendants, based upon adverse possession. The complainant cannot maintain his action to remove a cloud upon his title and quiet possession on general principles of equity, without clear proof of both possession and the legal title in himself. It is said in *Frost* v. *Spitley,* 121 U. S., 556:

" 'Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton,* 8 Cranch, 462; *Peirsoll* v. *Elliott,* 6 Pet., 95; *Orton* v. *Smith,* 18 How., 263; *Crews* v. *Burcham,* 1 Black, 352; *Ward* v. *Chamberlain,* 2 Black, 430. As observed by Justice Grier, in *Orton* v. *Smith*: 'Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on title.' 18 How., 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable, or, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. *U. S.* v. *Wilson,* 118 U. S., 86; *Fussell* v. *Gregg,* 113 U. S., 550.'

"This is also the rule in Kentucky. In *Packard* v. *Valley Co.,* 8 S. W., 779, (96 Ky., 249), the court say: 'The general rule and one well settled in this state is that in order to maintain an action

quia timet the plaintiff must have both title and actual possession.' See *Armitage* v. *Wickliffe*, 12 B. Mon., 44; *Campbell* v. *Disney*, 93 Ky., 41."

In *Frost* v. *Spitley*, 121 U. S., 552, the syllabus reads: "Under the jurisdiction and practice in equity, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complaint."

And in the opinion of the court by Mr. Justice Gray, it is said: "At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than an equitable title. The sale on execution against him (if valid and effectual), and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not divest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than Redick had. Spitley's title, therefore, at best is but equitable, and not legal; and Frost, and not Spitley, is in actual possession of the land.

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of the real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."

In *Stanton* v. *Catron*, 8 New Mex., 369, the court, after referring to a number of cases, say: "Under these authorities it is clear that under the general jurisdiction in equity, independently of the statute, a bill to remove a cloud from and quiet a title to real estate could not be maintained without clear proof of legal title and possession in the plaintiff. * * * If it be the title to the land that is to be established and quieted, how is this to be done unless the plaintiff be required to assert and prove his title? If he has no title, what has he to quiet? Manifestly, nothing. How can he ask a court of equity to establish and quiet for him that which he has not, and to which he does not lay any claim or offer proof to establish? He should come into court asserting his title before the defendant should be required to establish his adverse

interest. He should establish this title as the foundation upon which a court of equity may construct a decree giving him the quiet and uninterrupted enjoyment of his estate. This we understand to be the settled rule in both federal and state courts under statutes of this character."

In *Holland* v. *Challen,* 110 U. S., 15, it is ruled in an opinion by Mr. Justice Field in a suit in equity to quiet title:

"Undoubtedly as a foundation for the relief sought the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will probably rest with the court."

If Annie Camp Field were a party to this suit, complainant's prayer as to the lots, the legal title to which was vested in Annie Camp Field, would, under the allegations of this bill, be denied.

In *Von Drachenfels* v. *Doolittle,* 77 Cal., 295, the court say:

"The theory advanced for the appellant is that the wife took the title in trust, and should be decreed to convey to him. But we think this relief is entirely outside the case made by the complaint. The complaint alleges that the plaintiff is the owner, and that the defendants' claim is without right. The judgment asked for would be that the plaintiff is not the owner, and that the defendants' claim is not without right, but, on the contrary, is the legal title, and should be conveyed to the plaintiff. It is obvious that the plaintiff cannot have a judgment in direct contradiction of the material allegations of his complaint. If in any case an action to determine an adverse claim can be brought under our statute upon an equitable interest (which we doubt; see *Frost* v. *Spitley,* 121 U. S., 552), it cannot be brought against the holder of the legal title."

Nor can the complainant sustain his claim that he should be allowed to add the amount of the assessment which would ratably fall to the equitable interest he claims in certain lots to the amount of the assessment against the lots to which he has the legal title, and thereby increase the amount involved so as to confer jurisdiction upon the United States Circuit Court, because of the statute of Missouri relative to suits involving the title to real estate.

The statute of Missouri is as follows:

"Any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion, or remainder, whether in possession or not, may institute an action against any person or persons having or claiming to have any title, estate or interest in such property,

whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interests of the parties severally in and to such real property." R. S. Mo., 1899, Sec. 650, Vol. 1, p. 261.

This is the only statute in Missouri relative to such suits, as its enactment is held to have repealed the former law. *Meriwether* v. *Love,* 167 Mo., 514.

That statute contemplates the institution of law actions as well as suits in equity.

While the distinction between suits at law and those in equity is abolished in Missouri the principles of the two systems of judicature are clearly recognized and enforced in that state.

In Missouri judicature, no more than in our Federal jurisprudence, will an appeal to equitable jurisdiction be allowed to remove a cloud from the title to personal property. *State ex rel.* v. *Wood,* 155 Mo., 425; *Indiana Mfg. Co.* v. *Koehne,* 188 U. S., 681.

In *Boston & M., etc., Co.* v. *Montana O. P. Co.,* 188 U. S., 626, in an opinion by Mr. Justice Peckham, it was ruled in regard to a suit in equity to quiet title:

"The contention that under the code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal Court." Citing *Whitehead* v. *Shattuck,* 138 U. S., 146.

This suit is one in equity in name and in essence, and is to be determined as such. The appeal to the chancellor is made on the ground that the complainant has a legal, salable title, upon which a cloud has been wrongfully cast by defendant, which interferes with his right to sell and convey that title and which depreciates the value of his property. The jurisdiction invoked in the Circuit Court was purely and solely equitable jurisdiction.

If the only issue be to determine whether the assessment in question is a valid assessment, the method of raising and trying that issue is specified in the law authorizing the issuance of the special tax bills. Payment of these tax bills cannot be enforced nor can the complainant's possession of his lands, if he has any, be disturbed until the holder of the tax bill shall first have instituted a common law action in a court of competent jurisdiction against the owners of each tract of land assessed, to recover judgment for the amount of the assessment and for its enforcement against the land. Such a suit is a law action, and every charge made by the complainant in his bill herein against the validity of the special assessment in question could be pleaded as a defense to a law action brought to enforce those bills. He claims that the law

under which they were issued is unconstitutional and void; that work was done by the contractor which was not called for by the contract and the price of such work unlawfully included in the amount of the assessment; that the proceedings of the municipal authorities of Westport in conjunction with the acts of the defendant constituted a violation of the anti-trust act and the commerce clause of the Constitution of the United States. All of these contentions could have been raised and determined in the law action brought in a state court to enforce the lien of the special assessment in question. In that action under the Constitution of the state (Mo. Const. Art. 2, Sec. 28), and under the laws of that state, the holder of the tax bills is entitled to a jury trial. R. S. Mo., 1899, Secs. 691 and 694. Those sections are as follows:

"Sec. 691. An issue of fact in an action for the recovery of money only, or specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided."

"Sec. 694. Where there are several causes of action united in a petition, or where there are several issues, and the court shall be of the opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials, which may be had at the same or different terms of the court, as circumstances may require. In all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful party, unless for good cause it shall otherwise order. The judgment upon each separate finding shall await the trial of all the issues."

If complainant's bill, so far as the lots to which he has an equitable claim are concerned, is grounded on Section 650 of the General Statutes of Missouri, quoted above, it being a suit in equity, then it is one having for its object and purpose "to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real estate." Why does the prayer of the petition not conform to the statute? How can a court of chancery ascertain and determine, define and adjudge the title and estate of the complainant, Richard H. Field, in this property, when the legal title is confessedly vested in Annie Camp Field, who is not a party to the suit, and when an undivided one-half interest in certain of the lots, according to the proof and assertions of complainant, is claimed by one George H. Camp, who is not a party to the suit? Is the prayer that the right or interest of complainant, Richard H. Field, be ascertained and determined to be an equitable interest or a legal

title, or any title? Complainant's bill, as we have seen, does not allege the character of his title, or indeed, that he has any *title*. Was it within the contemplation of the General Assembly of Missouri in the enactment of this statute that demands or claims, or rights of action, could be split up after the fashion that is indicated by complainant's present attitude in regard to his bill being supported upon this statute?

In Missouri a suit to determine the validity of such an assessment as those now in question is expressly ruled not to be a suit involving the title to real estate. *Barber Asphalt Paving Company* v. *Hezel*, 138 Mo., 228.

If he has a right by instituting this action to bring a corporation of a foreign state into this jurisdiction upon his call to determine the validity of an assessment levied against a lot to which he holds no legal title, but at best only an equitable claim to an undivided interest in that lot, then each of the others having a similar interest in that lot may institute in chancery a several suit with the same end in view, while the Paving Company under the law authorizing the levying of the assessments in question would be required, in order to enforce its special tax bills, to institute a suit against all the persons holding the legal title to the lot in a court of competent jurisdiction. *Garrison* v. *Frazier*, 165 Mo., 40, l. c., 47.

The Missouri statute contemplates that actions sounding in equity, based upon it to ascertain, define and adjudge the title to real estate, should involve all parties in interest. There is no escape from the conclusion that all parties interested in this controversy must be joined in the suit at bar, which is in form as well as in substance a chancery suit. In Missouri the universal rule of equity jurisprudence is enforced that in suits in equity all parties interested in the controversy are necessary parties. *Sampson* v. *Mitchell*, 125 Mo., 217, 228; *Burke* v. *Flournoy*, 4 Mo., 116.

The tax bills in question are enforceable only in a court of competent jurisdiction; and the statute relative to their enforcement contemplates a law action in which all parties in interest must be joined if the lien be enforced. R. S. Mo., 1899, Sec. 5986. The record shows such a law action to be pending in the state courts. (Transcript of Record, p. 199.) Unless complainant have the legal title otherwise pure, otherwise salable by him, what measure of relief may equity afford him which would not be granted in the law action? Why does not the law action, required by the statute to be instituted to enforce these tax bills, afford him a plain, adequate and complete remedy so far as the lots in which he has but an equitable interest are concerned? He cannot sell and convey those lots; for the title is in another. His possession, if he has

any, cannot be disturbed till that law action is determined and its judgment enforced. He cannot be coerced into paying the tax until its validity has been established in a suit at law. The court in which that action is required to be brought has jurisdiction to protect and determine all rights invoked by complainant in this suit. If the law action to enforce the special tax bills affords him adequate relief as to the lots in which he has but an equitable interest, then the assessment against those lots should not be considered in determining the jurisdiction of the court in this cause. The Federal statute prescribes: "Suits in equity shall not be sustained in either of the courts of the United States in any case when a plain, adequate and complete remedy may be had at law." U. S. Comp. Stat., 1901, Sec. 723.

The complainant is without any legal title under this record to the lots standing in the name of Annie Camp Field. Upon the record made he has not even a lien against those lots. He claims, and his claim is supported only by parole evidence, a right in those lots, but his claim does not reach the dignity of a title. Annie Camp Field, in whom, it is conceded and is shown by the record, the fee simple title is vested, is not a party to this suit. She would not be estopped by a judgment in this cause from asserting in a suit between her and the Paving Company what the records of the Recorder of Deeds of Jackson County show to be a fact, namely, that she is the absolute owner of the real estate referred to. George H. Camp, whom complainant's proof shows has an equitable claim similar to his own to these lots, would not be estopped in a suit similar to this between himself and the Paving Company by the adjudication of this cause. The ancient principles and practices in equity and law courts abhor the multiplying of litigation and the splitting of demands or causes of action.

The Circuit Court being without jurisdiction because the amount in controversy in this suit does not exceed the value of two thousand dollars, its judgment should be reversed and complainant's bill dismissed.

II.

THE DECREE CANCELLING WYANDOTTE STREET BILLS IS ERRONEOUS.

That part of the decree of the Circuit Court adjudging the ordinance to pave Wyandotte street with an asphalt pavement, and the tax bills issued in payment of that work, to be void on the

ground that the asphalt pavement was unnecessary and the ordinance ordering it unreasonable and void, because five years previously the same street had been macadamized, is not responsive to any issue raised upon the pleadings and is contrary to the rights and equities of the Paving Company.

(a) No issue as to the unreasonableness, or *ultra vires* of the ordinance to pave Wyandotte street with asphalt, or indeed of any of the three ordinances to which the language of complainant's bill equally applies, is raised by the pleadings in this suit.

The bill of complaint in this cause originally contained twelve charges or paragraphs; and it was somewhat lengthened by amendments. Each charge was directed to three separate streets, so it becomes apparent that there were thirty-six charges in the bill.

The only language in this bill which by stretch of latitude can be claimed to charge that the action of the Council in ordering the work done, and contracting for it, was unreasonable and without the sphere of its legislative authority, is contained in the sixth charge. The gravamen of that charge is the accusation that the defendant circulated among the resident property owners a petition for this work, and induced them to sign it by wicked and unlawful promises and considerations, and by such petition caused the work to be ordered by the municipal authorities. And as an argument to enforce that position, and as a side-coloring to make the enormity of the charge more apparent, this language is used as a part of a sentence and not as an independent allegation, "and the order for the work aforesaid upon each of the three streets aforesaid was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same or either of them necessary to be done, but because of the lobbying," etc.

Now, let us eliminate the words "or because said Board of Aldermen deemed the same or either of them necessary to be done," because the resolution and ordinance of the Aldermen are in evidence on the part of the complainant, and the uniform holding of all courts is that the express enactments of legislative bodies are the evidence, and sole evidence, of the intention of such bodies. That is, that a legislature must be taken to mean what it says it means.

In *City of Kansas* v. *Richards*, 34 Mo. App., 521, 531, it is said:

"The passage and promulgation of said ordinance, providing for the establishment of said sewer district and the construction of the sewer therein, furnishes indubitable evidence that the common

council of said city deemed said sewer necessary for sanitary and other purposes."

We have, then, as the only allegation of the bill tending to raise this issue these words which are in the middle of a sentence charging corruption; the order for the work "was in each case not due to any necessity therefor, * * * *but* because of the lobbying," etc.

The language of the entire charge of complainant's bill in this respect is as follows:

"Sixth. For the purpose of forestalling any remonstrance from the residents of the City of Westport owning property fronting on such pavements, before any plans or specifications for them or either of them were made and filed in said City of Westport, and before any resolution or ordinance ordering such streets or either of them to be paved were passed, the defendant circulated among such residents a petition in each case asking the Board of Aldermen of said City of Westport to cause such work to be done, and induced the said residents of said late City of Westport to sign said petition and to refrain from remonstrating against such improvements by promises of rebates on the amount of tax bills to be issued against their property for said improvements, and by other favors to such residents upon the costs of such work, and thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the Board of Aldermen of said City of Westport, and the order for the work aforesaid, upon each of the three streets aforesaid, was in each case not due to any necessity therefor, or because the said Board of Aldermen deemed the same, or either of them necessary to be done, but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners, and because of their lobbying with the Board of Aldermen of the City of Westport, and the defendant's undue and illegal influence over the Board of Aldermen of said City of Westport." (Transcript of Record, pp. 3, 4.)

The charge that a street pavement is not necessary is certainly not a charge that the ordinance authorizing it is unreasonable, or that the legislative authorities exceeded their authority in enacting it.

This is a Missouri case. It involves the construction of Missouri's laws, the enforcement of her policies. In construing pleadings, at least, counsel for defendant have the *right* to rely upon the schooling of the state courts as to state policies and state laws affecting local affairs.

We have in this bill the charge that the municipal action was the product of the corrupt practice of the agents of the defendant rather than necessity. Viewing the allegation from complainant's standpoint, to say that the charge is that this asphalt pavement was not "necessary to be done," is putting this charge in the strongest possible light justified by this bill. Our contention is that this allegation does not raise an issue of the *ultra vires* of the ordinance, its constitutionality, or its unreasonableness; that no proof was adduced by defendant below upon any such issue, and that the learned chancellor went out of the record to determine it.

In *Seibert* v. *Tiffany*, 8 Mo. App., 33, 37, the court said:

"The passage of the ordinance is conclusive as to the *necessity* of the work."

In *Bohle's Admr.* v. *Stannard*, 7 Mo. App., 51, 55, the court said:

"This work was ordered in the exercise of a discretion committed to the city legislature, which discretion we have no power to revise. Nor have we anything to do with the reasons, or alleged reasons, for the legislative action. The ordinance directing the work settled the question that the exigency contemplated by statute had arisen."

In *Mining Co.* v. *City of Joplin*, 124 Mo., 129, 138, our Supreme Court, in an opinion by Presiding Judge Black, said:

"It is for the city council to determine the question whether the public welfare requires or makes the sewer *necessary* or expedient. With that question the courts have nothing to do, for the law has confided it to the judgment of the city council."

In *Skinker* v. *Heman*, 148 Mo., 349, 355, the court said:

"The power to grade and improve its streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the corporation may require, and of *the necessity* and expediency of its exercise *the governing body of the corporation, and not the courts, is the judge.*"

It is unquestionably established practice in Missouri, as shown by these authorities, that the sole charge that municipal work is not necessary when that work has been ordered by ordinance in due form, does not state a cause of action and does not put respondent on proof as to any issue. We invoke the protection, the security of this law. The course of this trial shows clearly that we have relied upon it. No evidence was introduced by defendant relative to the necessity for the improvement, or as to the condition of the old macadam, except such as was elicited relative to the issue as

to whether the roadway of these streets immediately prior to the laying of the pavements were approximately on grade.

The record discloses that the heroic exertions of the complainant were directed to show that the surface of each of these three streets was *off* of the grade; that they were so worn or washed that work beyond that required by the specifications had to be done, which added an additional and unlawful charge to the property owner, and it was in taking proof along this line of his aggression that certain expressions have been dropped from the lips of witnesses tending to show that the old macadam road on Wyandotte street was in the condition described; that is, that it was not worn more than four or five inches down, as one witness puts it, and that it was muddy, or dusty, at intervals. But neither complainant nor the defendant put a witness upon the stand to testify in detail as to the exact condition, or durability of that macadam road, or its adaptability to first class residence conditions.

The complainant asserted his contention to be that the surface of these streets, including Wyandotte street, before the asphalt pavement was laid, was not substantially upon the established grade, and that the Paving Company by bringing the streets to the established grade preparatory to laying the asphalt pavement, did work not provided for in the contract, the price of which was unlawfully included in the assessment evidenced by the special tax bills in suit. The Paving Company by proof sought to rebut this contention by evidence tending to prove that when it began the work the surface of all three streets were substantially upon the established grade.

Defendant's witness, A. M. Stalnaker, a civil engineer, and former city engineer of Westport, testified that each of the three streets at the time the asphalt pavement was commenced was substantially on the established grade. He was being cross examined by the complainant; and the witness in endeavoring to define what he meant by "substantially upon the established grade," said: "Well, in the first place let us suppose the street *is* on the established grade and consider what the contractor has to do. Q. (By complainant.) I cannot accept your supposition, *because it is not in this case.* What I mean is, what do you mean by practically at grade, how many inches might it vary? A. I mean, I consider a street practically at grade if the contractor does not have to do more work to prepare the subgrade than if he found the street on the established grade—absolutely on the established grade." (Transcript of Record, p. 398.)

To allow the complainant to occupy an attitude of duplicity before the court, to permit him by cunning and artifice to mislead

his adversary, to prostrate the truth, to outwit the court, and by such wiles to obtain something for nothing, is not to glorify the precious principle and foundation of our constitutional and common law defined by the phrase: No person shall be deprived of his property except by due process of law.

(b) In the City of Westport, acting in its legislative capacity, and not in the courts, was vested by the sovereign State of Missouri the authority and power to determine the necessity, expediency and the time when, and the material with which, its streets should be paved.

The charters of such cities, being a general law of the State of Missouri, confer powers upon such cities in this language:

"The cities coming under the provisions of this article in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law: * * * Second. To open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city." R. S. Mo., 1899, Vol. 2, Sec. 5979.

"When the Board of Aldermen shall deem it necessary to pave, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk), or otherwise improve any street, avenue, alley, or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the Board of Aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the Board of Aldermen shall have the power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided; and the finding of the board that a majority of such owners have not filed protest shall be conclusive and final." R. S. Mo., 1899, Sec. 5989.

"The Board of Aldermen shall have power to create, open and improve any public square, public park, street, avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient." R. S. Mo., 1899, Sec. 5990.

The exercise of such powers by municipalities is held in Missouri to be purely a legislative function, the exercise of legislative power. *Keating* v. *City of Kansas*, 84 Mo., 415, 419; *Wheeler* v. *City of Poplar Bluff*, 149 Mo., 36, 47; Dillon Mun. Corp., 3 Ed., Vol. 2, Secs. 949, 951.

The power to pave is held in Missouri to include the power to repave. Whether macadam is to be dignified by being classed as a street pavement, though this statute just quoted seems to distinguish them, is therefore immaterial.

In *McCormack, Admr.*, v. *Patchin*, 53 Mo., 33, 36, 37, it is said:

"The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. * * * As the power to tax and the power to make local improvements at the expense of the property benefited is, like all the other legislative powers of the municipality, a continuing one, unless there be something to indicate the contrary, it follows that the power to compel the property owners to pave generally extends to compelling them to repave when required by the municipal authorities."

Dillon's Mun. Corp., 3d Ed., Vol. 2, Sec. 686, states the rule as follows:

"That the power to grade and improve streets, like other legislative powers, is a continuing one, unless the contrary is indicated, has been frequently decided in both the national and state courts. It may, therefore, be exercised from time to time, as the wants of the municipal corporation may require. *Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges.*"

Mr. Elliott, in his work on Roads and Streets, page 335, has said in regard to the power of municipalities to improve their streets:

"This power is a continuing one and is not exhausted by being once exercised. The exercise of the power rests largely in the discretion of the municipal authorities and they, and not the courts, must judge of *the necessity* or expediency thereof."

In *The City of Kansas* v. *Richards*, 34 Mo. App., 521, 533, it is said:

"With the question of the unreasonableness or oppressiveness of a city ordinance passed in strict pursuance of an express grant of authority from the legislature, the courts have nothing to do. *The City of St. Louis* v. *Henrichs*, 6 Mo. App. 591."

In *Wabash R. Co.* v. *Defiance*, 167 U. S., 88, the validity of an ordinance of the respondent city changing the grade of a street at a railroad crossing from an overhead crossing to a crossing at

grade was challenged upon grounds quite similar to those urged against the street improvement ordinance in the case at bar. In the opinion by Mr. Justice Brown it is said:

"Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants. * * * The ordinances of February 7, 1893, were not beyond the powers of the common council with respect to the improvement of streets. While, in 1887, overhead bridges might have seemed a better and safer plan of crossing the railway than crossing at grade, the subsequent growth of the city may have demanded a different policy in 1893. * * * But, however this may be, *we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised;* or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but *it is beyond the province of the courts either to praise the wisdom, or criticise the unwisdom of such action.* The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

In the case of *Skinker* v. *Heman,* 148 Mo., 349, it was sought by the plaintiff to enjoin the issuance of a special tax bill against his land for laying a stone sidewalk in front of it at a cost to him of three hundred dollars. The gravamen of his complaint was that the ordinance and proceedings authorizing the work were unreasonable and void because he had a good brick sidewalk already in place that could have been put in repair for seven dollars. The court at page 355, said:

"The power to grade and improve its streets is a legislative power and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the corporation may require, and of the necessity and expediency of its exercise the governing body of the corporation, and not the courts, is the judge. * * *

"It is contended that as in the application of this ordinance to the plaintiff's property in front of which he has a brick pavement, confessedly out of repair, he would be required to expend $300 for replacing it with a stone pavement as required by the ordinance, when he could repair it with brick so as to make a very good pavement, at a cost of $7, the ordinance, as to him, is unrea-

sonable and oppressive, and as to him ought to be declared void, and the enforcement of the tax bills therefor ought to be enjoined, and for support of his contention he relies upon the case of *Corrigan* v. *Gage*, 68 Mo., 541, in which the charter power was substantially the same as in the case in hand, and in which we held that an ordinance requiring the 'paving of a sidewalk in an uninhabited portion of a city, and totally disconnected with any other street or sidewalk,' was unreasonable and oppressive, and refused to sustain it. That ordinance imposed a burden upon the adjoining property owners without any corresponding benefit to them or to the public; was wholly uncalled for by the conditions to which it was to be applied, appeared to be the offspring of mere legislative caprice and furnishes an apt illustration of that arbitrary abuse of municipal legislative power, for relief against which the power of the courts may be invoked. * * *

"The fact that in its application to the plaintiff's property, he will be required in the interest of the public for whose benefit it was enacted to lay down a stone pavement in front of his premises at a cost of $300, and which, for aught that appears to the contrary, may benefit his property to a reasonable extent, when he could have repaired his old brick pavement with brick at a cost of $7, furnishes no ground whatever for impeaching the validity of the ordinance."

In *Heman* v. *King*, 85 Mo. App., 231, 233, 235, it is said:

"The legal question presented by the record is, may the defendant, when sued on a special tax bill for reconstruction of a sidewalk or street on which his property abuts, defeat a recovery on the sole ground that the sidewalk or street was not out of repair, and that *the reconstruction was unnecessary*. In *Warren* v. *The Barber Pav. Co.*, 115 Mo., loc. cit., 580, Judge Macfarlane, speaking for the court, used the following language: 'In the performance of duties in which discretion is lodged with the governing authorities of a city, we think objections to the methods adopted by them, which are within such discretion, should be made before the work is done, unless fraud or collusion is shown. It would be unjust to a contractor who has completed an improvement in full compliance with a contract awarded him by the Board of Aldermen, which is within the general powers conferred upon it, to refuse payment for the simple reason that the courts may conclude that the means or methods adopted by the board were not the best or cheapest. If contracts could be vacated for such reasons, all security to contractors would be destroyed and the cost of improvements necessarily increased in order to insure against such contingencies.' Citing *Sheehan* v. *Owen*, 82 Mo., 464; *Ross* v. *Stackhouse*, 114 Ind., 200; *Cole* v. *Skrainka*, 105 Mo., 309; *Gibson*

v. *Owens,* 115 Mo., 258; *Morse* v. *Westport,* 110 Mo., 502; *Johnson* v. *Duer,* 115 Mo., 366. * * *

"To permit the defense in such cases, as was allowed on the trial of this cause, (that the improvement was not needed) would be intolerable, harassing and extremely detrimental to both the city and the real estate owners. In the language of Judge Macfarlane, in *Warren* v. *Barber Paving Co., supra,* if such defenses could be interposed 'all security to the contractors would be destroyed, and the costs of improvements necessarily increased in order to insure against such contingencies.' The contractor for these improvements contracted with the city, and is bound, when notified by the proper officer, to make them; he has no voice in the making of the ordinances providing for the improvements, nor is he to judge of the applicability of the ordinance to any particular sidewalk; his duty is to comply with his contract and make the improvement when notified, in the manner and with the material provided for by the ordinance, and it seems to us that *unless the ordinance under which the work is done is wholly void on its face, or is the product of collusion or fraud, the owner* of the real estate against which the special tax bill is issued *should be estopped to defend on the ground that the improvement was unnecessary.* * * * If they erred in their judgment by applying the ordinance to respondent's property, it was not the error of the contractor, and he should not be made to suffer for their mistake, nor should he, after having performed the work, be compelled to defend the correctness of their judgment in a suit on his special tax bills issued for the contract price of the work."

(c) The indisputable facts disclosed by this record clearly establish that the powers of the legislative authorities of the City of Westport in the enactment of the ordinance to pave Wyandotte street, and indeed in the enactment of each of the improvement ordinances now in contest, were exercised within the bounds of reason and apparent necessity.

The facts may be briefly summarized as, (1) the asphalt pavement was laid in the fall of 1897 and was *guaranteed* to remain in perfect repair for a period of five years after completion (Transcript of Record, p. 174); and it is not disputed that at the time of the trial, it was in excellent condition, doing service as a first-class street pavement; (2) that a majority of resident owners of lots abutting upon the part of the street to be improved had petitioned the city officials to have the same paved with asphalt at the time and in the manner ordered by those officials, although the con-

struction of the improvement as petitioned for imposed the obligation upon such petitioners to pay the same relative proportion of the entire cost of the work that complainant was required to pay. The petitioning property owners owning property on Wyandotte street were twenty-two in number and included Col. Charles F. Morse, Mr. Charles J. Hubbard, Mr. T. H. Mastin, Mr. R. H. Keith, president of the Central Coal & Coke Company, Mr. A. E. Stilwell, a railroad president, Mr. George W. Lee, Mr. A. J. McDonald, Mr. W. A. Rule, cashier of the National Bank of Commerce, and many others (Transcript of Record, pp. 169, 170). These expressed their judgment, and the learned trial court held it was a pure and unbought judgment, that this pavement was expedient and necessary and worth more than its price; (3) the United States Circuit Court, by causing the petition for this work to be signed by its receiver, in the case of *Mastin* v. *Mastin*, Mr. Hugh C. Ward (Transcript of Record, p. 170) expressed the favorable judgment of the court upon the improvement; (4) all the members of the Board of Aldermen and the Mayor of the City of Westport concurred in ordering this improvement; (5) no property owner along the entire street, although due notice by publication had been given of the intention to improve it at the expense of the property owners—not even the complainant—protested or attempted to protest against the work; (6) the macadam on Wyandotte street had been in service for five years; it was worn down three or four inches; in dry weather there arose from it a dust detrimental to household furniture and the health of residents along it, and in wet weather it was muddy. The Supreme Court of Missouri have said in reference to such a pavement: "It would be hard to suggest a cheaper or more primitive effort to put the street into condition for use as a thoroughfare." *Morse* v. *Westport*, 136 Mo. l. c., 284; (7) an adequate allowance was made in the bid for relaying the asphalt for the value of the old macadam then in place, which was to be used as a base of the asphalt pavement; (8) every witness who was called to testify with regard to the benefit sustained by abutting property by reason of this pavement (this testimony was introduced by the defendant paving company upon the issue raised by complainant's bill as originally drafted, to the effect that the charter law of the city of Westport was void, because, without regard to benefit, it required the cost of the pavement to be assessed and charged against abutting lands in proportion to their frontage upon the improvement,) testified that the pavement of the street complained of here increased the value of complainant's property on Wyandotte street about ten dollars per front foot; and there is no proof to the contrary.

It has been ruled by the Supreme Court of Missouri in a case where the issue of the unreasonableness and the arbitrary character of an ordinance to pave a street in the City of Westport was directly raised by the pleadings, and one in which the attack was made before the work was done, that the ordinance was not amenable to the charge, although the facts in judgment were more favorable to that contention than those disclosed by this record, *Morse* v. *City of Westport,* 110 Mo., 502. The opinion is by Sherwood, P. J. (the same judge who wrote the opinion in *Corrigan* v. *Gage,* 68 Mo., 541). In the opinion it is said:

"But whether the city, though having general authority to construct, build, make or pave streets in the manner indicated, had any authority to do so in this particular instance is brought into question by the plaintiff upon the ground that the ordinance is unreasonable. On this point it may be observed that the authorities of a city are invested with a large discretion in determining the necessity or expediency of ordinances they shall adopt; and when those powers are exercised within the bounds of reason and apparent necessity they should not be held null by the courts. * * * When the courts are called upon to exercise judicial power in declaring a municipal ordinance unreasonable, they will make such declaration only when the *prima facie* case made by the passage of the ordinance is overcome in the most satisfactory manner." Citing, *State* v. *Inhabitants,* 53 N. J., 132.

In *Morse* v. *Westport,* 136 Mo., 276, another ordinance of the City of Westport authorizing the improvement of a street was declared to be within the bounds of reason and apparent necessity. Macfarlane, J., in his dissenting opinion on page 286 concedes the law to be as follows:

"No proposition of law is better settled in this state, or receives more general recognition in the courts of this country, than that in determining *what street improvements shall be made,* and what property will be benefited thereby, in fixing benefit districts and apportioning the tax throughout the district, the discretion of the municipal legislative authorities is conclusive upon the courts. Where legislative powers are delegated to a municipal corporation, its discretion within the legitimate sphere of its authority is proportionately as wise as is a like discretion possessed by the legislature of the state, 'and as free from outside interference, and that discretion is not subject to judicial revision or reversal.' *State ex rel.* v. *Schweickardt,* 109 Mo., 511, and cases cited. * * *

"It is true that the whole theory of local assessments is that the improvements for which they are levied affords remuneration to the property owner in the way of benefits, and to go beyond the limit of

compensation in making assessments would be to exceed the power of taxation; yet the honest legislative action of the council raises a conclusive presumption that the benefits received from the improvements will equal the charge imposed. The law presumes that the council has made careful investigation before it acted. To say that the courts have the right of review would substitute their discretion for that of the legislature, and would practically deprive the city of the legislative powers conferred upon it."

(d) Complainant should not now be heard to say the tax bills for paving Wyandotte street are void on the ground that the ordinance authorizing the work was unreasonable or the work unnecessary.

In neither his pleadings nor his proof has he asserted or established the fact that he did not have full knowledge, that this improvement had been by ordinance of the City of Westport directed to be made and had been contracted for, before the contractor entered upon the execution of the work and that he was not then aware of all the facts which he now urges in support of the assertion that the asphalt pavement was unnecessary. He knew that the Paving Company in all that it did was relying upon the contract whose terms and method of execution conformed to law, and he did not notify it or its representatives before, or during the progress of the work, that he would contest the validity of the contract or of the assessment levied to pay the contract price on that ground. It is true the evidence tends to show that after the work was done he made some vague threats to contest the validity of the special tax bills in question as a justification for a demand for a reduction in the amount to be paid by him upon this assessment. (Transcript of Record, p. 199.)

In fact he stood by while the Paving Company expended its wealth in constructing a permanent and valuable pavement upon the street in front of his lands which materially increased their value. He now has and enjoys in the increased value of his property the benefit conferred by that improvement. He did not raise this issue of the necessity of the work by formal notice, or by suit to declare the municipal ordinance void or to restrain the execution of the work before it was done. He knew that the ordinance authorizing the work was fair and valid upon its face, and that the city of Westport in executing a contract with the Paving Company pursuant to the requirements of that ordinance was in a sense his representative and agent.

Judge Dillon in his work on Municipal Corporations, Vol. 2, Sec. 810, (3rd Ed.), has said: "But although the property owners are not privies or parties to such contract, yet to a certain extent and in a substantial sense, the municipality is their agent."

Such is the rule in Missouri. In the recent case of *Hilgert* v. *Barber Asphalt Paving Co.*, in the Kansas City Court of Appeals, which was decided during the pending term and is not yet reported, it is said by the court in referring to the attitude of a complainant who sought to have certain tax bills against her lands adjudged void: "The improvement was one that *her agent*, the city, was duly authorized by its charter to have made."

The complainant remained silent and inactive while this improvement was being authorized and contracted for by the municipal authorities, and while defendant was expending its labor and material in constructing a public thoroughfare and was thereby enhancing the value of his lands. The courts were then open; and he could have then raised and had determined the issue as to whether the ordinance ordering the work was void on the ground that the work was not necessary. Two years and more after the work was completed he approaches the sacred precincts of a court of conscience with his arms loaded with the products of another's expenditure. His petition is for the removal of a cloud upon his title caused by an assessment of benefits against his lands arising from a public improvement; to grant it is to deprive the builder of that improvement of all compensation for his work and to give the supplicant something for nothing. If he had promptly exposed the alleged secret infirmity of the ordinance ordering the work a loss to the contractor would have been avoided and he would have escaped the accusation of having, by silence, come into the enjoyment of the property of another without paying for it. Such an attitude and such conduct shock the conscience. It is contrary to the common principles of justice. He who comes into equity must come with clean hands. He who seeks equity must do equity. Those alone are welcomed to the precincts of equity who come in the spirit of equity.

The case last referred to of *Hilgert* v. *Barber Asphalt Paving Company*, recently decided by the Kansas City Court of Appeals, and not yet reported, was one brought by Josephine Hilgert, appealing to the equity jurisdiction of the court, to cancel certain tax bills as clouds upon her real estate. The principal contention was that the contract required the work to be completed on or before a certain date, and in that respect the contract had not been performed. The court in an unanimous opinion by Presiding Justice Smith, said: "The improvement was one that her agent, the city, was duly authorized by its charter to have made, and it was completed by

defendant according to the special ordinances, and the contract work was accepted by the city. And for aught that appears she stood by and saw the defendant expend its material and labor and money in making same without protest or objection; but when it was completed, when she had received all the benefits which could result to her lots from so substantial an improvement, she then, for the first time, objected and invoked the interposition of a court of equity to relieve her property from being burdened with its proportion of the cost of such improvement. It does not appear that the delay in the completion of the improvement was unreasonable or that plaintiff suffered any injury in consequence of it, and I think she has not shown herself entitled to equitable relief."

In *Heman* v. *King*, 85 Mo. App., 231, it is said: "The contractor for these improvements contracted with the city, and is bound, when notified by the proper officer, to make them; he has no voice in the making of the ordinances providing for the improvements, nor is he the judge of the applicability of the ordinance to any particular sidewalk; his duty is to comply with his contract and make the improvement when notified, in the manner and with the material provided for by the ordinances, and it seems to us that unless the ordinance under which the work is done is wholly void on its face, or is the product of collusion or fraud, the owner of the real estate against which the special tax bill is issued should be estopped to defendant on the ground that the improvement was unnecessary.

"That issue (the applicability of the ordinance to respondent's property), should have been tested *before* the work was done by an appropriate proceeding between respondents and the city or its street commissioner. Respondents having failed to do this, have lost their day in court, and are estopped to raise it against the contractor in a suit on the special tax bill."

In *Huling* v. *Bandera Flagstone Co.*, 87 Mo. App. l. c., 360, the opinion of the court by Presiding Justice Smith, uses this language: "An examination of the various contentions made by the plaintiff has not impressed us with the conviction that he is entitled to any equitable relief. He knew the ordinance providing for the construction of the sidewalks had been passed, yet he stood still and did not move until he saw the contract let and the work completed thereunder—until his property had, without any expense to him, received the full benefit resulting from the street improvement. Under these circumstances little heed should be given to his complaint."

In *Gill* v. *United States*, 160 U. S., 426, the claim of an employe against the United States for compensation for the use by the government of inventions made by him while in the employ of the

government was under consideration. In stating the underlying propositions, the court, in the opinion by Mr. Justice Brown, said: "The principle is really an application or outgrowth of the law of estoppel *in pais* by which a person looking on and assenting to that which he has the power to prevent is held to be precluded forever afterwards from maintaining an action for damages. A similar instance is that of one who stands by while a sale is being made of property in which he has an interest and makes no claim thereto, in which case he is held to be estopped from setting up such claim."

If the contractor is defeated in enforcing the lien of this assessment upon abutting lands he cannot recover the contract price, or any compensation for the materials and labor expended in the construction of this street. *Keating* v. *Kansas City*, 84 Mo., 415, *Saxton* v. *St. Joseph*, 60 Mo., 153.

In *Shehan* v. *Owen*, 82 Mo., 454, the court said: "The work has been done by the plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials; and while there may have been irregularities, the ordinances were substantially complied with by the city authorities and nothing done, or omitted, which could possibly have affected injuriously the interests of the defendant or other property holders, and we are not inclined to turn a plaintiff out of court who has given his time and expended his money in the improvement of their property on mere technicalities which in no manner affect the substantial rights or interests of the parties."

III.

NO CORRUPT PRACTICES.

There is no merit in the complainant's charges that the petitions for the work, in payment of the price of which the special tax bills in controversy were issued, were procured by promises of rebates, or that the ordinances ordering the work were enacted because of the lobbying of the defendant.

(a) There is no proof—not even a scintilla—that there were any unlawful practices on the part of the defendant in connection with the improvement proceeding in question.

And such was the holding of the Chancellor. In his Findings it is said: "I have searched the record and find no evidence of corruption. * * * I fail to find evidence that there was any sharing of profits with any of the aldermen, or of receiving by, or offering rebates to, any of the property owners." (Transcript of Record, p. 519.)

(b) The allegations in complainant's bill in respect to lobbying or fraud are not sufficiently definite to constitute a cause of action, or to require defendant to plead and make proof thereto.

In *Nagel* v. *Lindell R. R.*, 167 Mo., 89, in an unanimous opinion of the court it is said: "A mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading, and would be stricken out on motion. We have said this so often that it would seem useless to cite authorities to support it. *Bank* v. *Rohrer*, 138 Mo., 369; *Goodson* v. *Goodson*, 140 Mo., 206; *Burnham* v. *Boyd*, 167 Mo., 185; *Wood* v. *Carpenter*, 166 Mo., 465; 9 *Enc. Pldg.* & *Prac.*, p. 683. The petition charges that the municipal assembly was corrupted by bribery, but does not state who was the briber nor who the bribed. There are three corporations involved, two of which, according to the petition, acquired their interests after the franchise had been granted. Whether it is intended to include them in the charge is not clear. 'Their agents, servants, and attorneys' designates a large and unknown class. 'The aldermen, councilmen and members of the municipal assembly' covers a large number of officials in general, but points to no one in particular. Paying or promising to pay 'stocks, bonds, privileges and large sums of money to vote for said pretended franchise and ordinance' is as vague and uncertain as language could make the charge. There is no statement as of a fact which could be traversed; there is no issue tendered. A demurrer admits only facts well pleaded. It does not admit a mere characterization, which is all there is of the charge of fraud in this petition."

To the same effect is *Nichols* v. *Stevens*, 123 Mo. l. c., 117. "That it is necessary to set forth in a petition the facts constituting the fraud pleaded, no one has ever doubted or denied. Logical and legal consistency, therefore, require that an answer should as necessarily state the constitutive facts of the fraud relied on, as that a petition should do so. This is the view taken by Judge Bliss in his work on pleading, where he says: 'In alleging fraud it will not suffice to say that the party fraudulently procured, or fraudulently induced, or fraudulently did this or that, or that he com-

mitted or was guilty of fraud; the facts which constitute the fraud must be stated.'"

IV.

MISSOURI STATUTE CONSTITUTIONAL.

The constitutionality of the general law of Missouri relative to cities of the fourth class in respect to improving streets, Secs. 5982 to 5989, Vol.,2, R. S. Mo., 1899, can not be successfully challenged on the ground of depriving a person of property without due process of law, or of not affording non-residents of the city the equal protection of the laws.

(a) If this contention grows out of the fact that the assessments are levied on abutting property according to the frontage, it will avail plaintiff nothing on the showing made by this record, in which the unchallenged testimony proves that each lot headed in on the street improved, and that the value of each lot was increased by reason of the improvement in an amount exceeding the cost of the improvement; and that the benefit from the improvement to property along the street was shared by such property, ratably according to its frontage. *Schaeffer* v. *Werling*, 188 U. S., 516. *French* v. *Barber Asphalt Paving Co.*, 181 U. S., 324; *Wight* v. *Davidson*, 181 U. S., 371; *Tonawanda* v. *Lyon*, 181 U. S., 389; *Webster* v. *Fargo*, 181 U. S., 394; *Cass Farm Co.* v. *Detroit*, 181 U. S., 396; *Detroit* v. *Parker*, 181 U. S., 399; *Wormley* v. *District of Columbia*, 181 U. S., 402; *Shumate* v. *Heman*, 181 U. S., 402; *Farrell* v. *West Chicago Park*, 181 U. S., 404; *King* v. *Portland*, 184 U. S., 61; *Voight* v. *Detroit*, 184 U. S., 115; *Goodrich* v. *Detroit*, 184 U. S., 432.

(b) The challenge of the statute as being unconstitutional in not affording non-residents equal protection of the law is doubtless based on the language of Section 5989, which provides that an improvement proceeding shall be inaugurated by the adoption and publication for two weeks of a resolution declaring the intention on the part of the city to improve the street. This is followed by this provision of the statute:

"If a majority of the resident owners of the property liable to taxation therefor shall not within ten days from the date of the last insertion of said resolution file with the city clerk their protest against such improvements, then the board of aldermen shall have the power to cause such improvements to be made, and to contract therefor and to levy the taxes herein provided." R. S. Mo., 1899, Vol. 2, Sec. 5989.

This language defines the extent of the authority granted and conferred by the legislative department of the state to the legislative department of the municipality relative to contracting for street improvements. The sovereign power of legislation, which, under our system of government, is vested in the state legislature subject only to the restrictions thereon contained in the state and Federal constitutions, is absolute. The legislative functionaries of the municipality have only such authority as is directly, or by necessary implication conferred upon them by the state legislature. The aldermen of the City of Westport have authority to improve a street at the expense of the abutting property owners only upon first adopting and publishing the resolution referred to followed by the absence of a protest from a majority of the resident owners whose lots are liable to pay for the improvement. That the judgment of resident property owners in general as to the necessity for the improvement, the time when it should be made and its character, is better than that of non-residents, is hardly open to argument. They are acquainted with the actual conditions by personal observation and experience. They have the opportunity to discuss these matters with those equally informed. It is practicable to obtain an expression from them. It would be impracticable to endeavor to search through foreign states and nations for an expression of opinion from non-residents as to the advisability of a local improvement.

It is the public policy of Missouri, as shown by repeated legislation, to allow residents of municipalities a determinative voice in deciding when local improvements shall be made and their character.

The Kansas City Charter, Article IX, Section 2, gives to resident owners of a majority of front feet of a street the right, by petition, to determine the character of street improvements.

The Statute of Missouri, R. S., 1899, Sec. 5683, provides that whenever a petition is required under existing laws for street improvements, "the petition shall be sufficient if signed by property holders owning a majority of the front feet of property owned by

residents of the city fronting on the street, sidewalk, alley or avenue or public highway, or part thereof proposed to be improved." This applies to all cities of the second class in that state.

And R. S. Mo., 1899, Sec. 5860, which is applicable to all cities of the third class in the state, provides, "if a majority of the resident owners of the property liable to taxation therefor shall not within ten days thereafter (*i. e.*, after the publication of a declaratory resolution) file with the city clerk of the city their protest against such improvements, then the council shall have the power to cause such improvements to be made and to contract therefor and levy the taxes as herein provided."

Again, R. S. Mo., 1899, Sec. 5989, which applies to all cities in this state of the fourth class, being the section now under consideration, has substantially the same provision as that last quoted.

Our sister state, Kansas, has the same policy. G. S. Kansas, 1899, page 165, Sec. 713, provides for the publication of a declaratory resolution, and thereafter, "if a majority of the resident owners owning a majority in square feet of the lots or real estate liable to taxation therefor shall not within twenty days thereafter file with the clerk of said city their protest in writing against such improvement, then said Mayor and council shall have power to cause such improvements to be made and contract therefor and levy taxes as provided by law." This applies to cities of the first class in the state of Kansas.

The same rule obtains in Kansas with reference to cities of the second class. G. S. Kan., 1899, page 227, Sec. 980.

A similar policy prevails in many other states. These laws have been on the statute books many years, and have been enforced, and have frequently come under judicial scrutiny, but never to our knowledge has one been held unconstitutional under the challenge now made.

The question has been ruled by our Supreme Court adversely to complainant's contention in the case of *Buchan* v. *Broadwell*, 88 Mo., 31. This was a case arising under the then Kansas City Charter, which required a petition of the residents of Kansas City, who owned a majority of the front feet of land upon the street to be improved, as jurisdictional to the authority of the common council to order the street improved at the expense of the abutting property owners. The court in an unanimous opinion disposes of the contention similar to the one now under consideration, in this language: "There is nothing in the constitutional objection made that non-resident property owners are discriminated against by Section 1, Article 8, of the charter, which provides that 'the common council on the petition of residents of Kansas City,

who own a majority of front feet on a street to be graded, may order the same to be graded at the expense of the property owners.' When it is done the same rule of assessment applies to all the property whether owned by residents or non-residents. *2 Dill. on Mun. Corp.*, Secs. 752, 802. The legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition. *Railroad Co.* v. *City of St. Louis*, 66 Mo., 228; *Farrar* v. *City of St. Louis*, 80 Mo., 379."

It would seem that the Legislature of a state in the exercise of sovereign legislative powers could confer upon, or withhold from, the legislative functionaries of a municipality within the state such a degree of legislative power relative to local affairs as their sovereign wisdom should dictate; in other words, that they could establish such checks upon the exercise of delegated legislative powers by a municipality as were deemed appropriate. It cannot be said that the extent of the power so conferred, the efficiency or weakness of that check upon the exercise of the power conferred, is a subject within the domain of constitutionally guaranteed rights of the citizen.

The right to practice law in the courts of a state is not a privilege or immunity of citizens of the United States. *Broadwell* v. *Illinois*, 16 Wall., 130. Nor is the right to sell intoxicating liquors. *Grozza* v. *Tiernan*, 148 U. S., 657. In delivering the opinion of the court in the case last cited the Chief Justice said: "The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer* v. *Iowa*, 85 U. S., 129."

Indeed the privilege and immunity clause of the Fourteenth Amendment does not guarantee a citizen of a state against laws of his own state. Its purpose is to guarantee the privileges and immunities of citizens in other states than their own. *The Slaughter-house Cases*, 16 Wall., 36; *Broadwell* v. *Illinois*, 16 Wall., 130.

How then can it be said that the circumstance that one or more remonstrators against a public improvement shall have the effect of curtailing municipal legislative authority with respect to that work is a privilege, immunity, or property right of a person of the character of those intended to be protected by the Federal Constitution?

Reasons for placing resident property owners of cities in a different class from non-residents, when the efficacy of a remonstrance of property owners in respect to the expediency of a local public improvement is under consideration, are founded in a wise public policy and are fortified by long established and widely extended customs.

This law treats all persons alike under like conditions both as to the privilege conferred in regard to signing remonstrances and the amount of tax to be levied to pay for the improvement.

In *Taggart* v. *Claypool,* 145 Ind., 590, was considered the validity of a statute providing for the extension of the city limits of certain cities in Indiana. It was urged that the statute was unconstitutional under the state and Federal constitutions because it granted the right of appeal to resident freeholders only, and denied an appeal to non-residents. The law was held valid, and the court in their opinion say:

"It is contended therefore, that as the right of appeal is given only to resident freeholders in the territory sought to be annexed, and the same right impliedly denied to owners of land in the territory who do not reside therein, they are denied the equal protection of the law, their property taken without due process of law, and that privileges and immunities are granted to such resident owners which are denied to plaintiffs on the same terms. * * * The convenience, safety and protection of a resident land owner in the territory may be, and very likely is, different from that of a non-resident land owner in the territory. The one may be interested in, and need, police and fire protection, water, light and gas, which the city might afford to him on slight cost; whereas the non-resident might not desire or have any use for such things, and hence ought no more, in justice, to have a voice in preventing the residents from securing these advantages than he should be allowed to vote on the levy of a local school tax in that territory, simply because he owned property therein. Therefore the grant of the right of appeal to the resident freeholders only is not a grant to any citizen or class of citizens of privileges or immunities which upon the same terms, do not equally belong to all citizens. The terms upon which they are to have a voice in the annexation is such an interest therein as a resident has. * * * In *Hayes* v. *Missouri,* 120 U. S., 68, Mr. Justice Field, speaking for the court, said: 'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circum-

stances and conditions, both in the privileges conferred and the liabilities imposed.' To the same effect are *McPherson* v. *Blacker,* 146 U. S., 39; *Soon Hing* v. *Crowley,* 113, U. S., 709. We have already seen that all owners of land in the territory to be annexed are by the statute in question treated alike under like circumstances and conditions, and hence it does not deprive any one of the equal protection of the laws. Therefore the statute does not violate the Fourteenth Amendment to the Constitution of the United States."

In *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S., 308, this court, in an opinion by the Chief Justice, held that equal protection of the law is not denied to life insurance companies by the provisions of a Texas statute imposing on such companies upon failing to pay a loss within the time specified in the policy, in addition to the amount of the loss, the sum of twelve per cent thereof as damages and reasonable attorney's fees, although such obligation is not imposed on other classes of insurance companies. The court fortified their decision with this language:

"The ground for placing life and health insurance companies in a different class from fire and marine insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges and benevolent associations of the character mentioned in the Texas statutes is not arbitrary classification but rests on sufficient reason."

In *Missouri Pacific R. Co.* v. *Mackey,* 127 U. S., 205, opinion by Mr. Justice Field, it is said:

"The objection that the Law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the cause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character: * * * * A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to

keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

In *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S., 823, 293, opinion by Mr. Justice McKenna, it is said:

"The clause of the Fourteenth Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U. S., 321. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U. S., 68. * * * With these for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. * * *

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances, it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be of a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B (*Missouri P. Ry. Co.* v. *Mackey*, 127 U. S., 205), to a different measure of damages than B (*Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S., 26), and it permits special legislation in all of its varieties."

In *Head* v. *Daniels*, 38 Kan., 1, the constitutionality of the law of Kansas which requires a bond from the plaintiff to be first executed in attachment cases where defendants are residents of the State of Kansas, "but no undertaking shall be required where the party or parties defendant are non-residents of the state or a foreign corporation," was challenged as violative of the Federal and state constitutions. The court disposes of the contention with the words "We think the statute is constitutional and valid."

The Supreme Court of Missouri has upheld the validity of the laws of that state providing separate schools for colored children against the charge of being in conflict with the Fourteenth Amendment of the Federal constitution, although it was conceded that plaintiffs had to go three and one-half miles to reach a colored school while no white child in the district had to go more than two miles. The court adopts this language:

"Equality, and not identity of privileges and rights, is what is guaranteed to the citizen. * * * Color carries with it the natural race peculiarities which furnish the reason for the classification." *Lehew* v. *Brummell*, 103 Mo., 546.

Similar results have been reached in other states: *People ex rel. King* v. *Galligar*, 93 N. Y., 438; *State ex rel. Garnes* v. *McCann*, 21 Oh. St., 198; *Cory* v. *Carter*, 48 Ind., 327; *Ward* v. *Flood*, 48 Cal., 36; *Roberts* v. *City of Boston*, 5 Cush., 198.

In *Cameron* v. *Railway Co.*, 63 Minn., 384, a statute allowing plaintiff reasonable attorney's fees in actions brought under the statute to recover possession of lands taken without compensation by a railroad company for its right-of-way, was held constitutional. The court said:

"Legislation is not prohibited either by the state or Federal constitution, which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated. *Barbier* v. *Connolly*, 113 U. S., 32. The legislature, however, cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each of the classes adopted. The classification, to be valid, must be based upon some reason of public policy, growing out of the condition or business of the class to which the legislation is limited. But a law which is confined in its application to a particular class of persons is not void as unequal class legislation if the distinction is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances. *Nichols* v. *Walter*, 37 Minn., 264; *Allen* v. *Press Co.*, 40 Minn., 117; *Lavallee* v. *Railway Co.*, 40 Minn., 249. This right to classify persons, corporations and associations, and to impose upon them, as a class, duties and liabilities, or to confer upon them privileges, not imposed or conferred upon the whole people of the state, is a matter committed to the sound discretion of the legislature, subject to the supreme condition that the classification must not be arbitrary, but must be based upon some natural reason of public policy."

Lent v. *Tillson*, 140 U. S., 316, upholds as valid against the charge of unconstitutionality a law granting to a majority in values

of the property owners fronting on a street the power by protest to defeat the improvement of the street.

A classification of railroads for the purpose of taxation by the length of their lines is sustained as lawful classification. *Dow* v. *Beidelman,* 125 U. S., 680.

A state may provide for different appellate courts with different jurisdictions and rules of practice for different portions of the state. *Missouri* v. *Lewis,* 101 U. S., 22.

The law allowing double damages for killing stock by railroads is constitutional. *Railroad* v. *Beckwith,* 139 U. S., 26.

In *Clark* v. *City of Kansas City,* 176 U. S., 114, an act authorizing cities to extend their limits, and to exclude therefrom lands inside those limits used for agricultural purposes, when the same is not owned by a railroad or other corporation, was held valid. The court in an opinion by Mr. Justice McKenna, said:

"In the case at bar the distinction is between tracts of agricultural lands in a certain relation to cities and lands used for other purposes in such relation.

"We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use, it could be taken for granted, would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city and not be moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do, may justify, if not require, their inclusion within the municipal jurisdiction.

"We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States."

(c) The inquiry as to the constitutionality of the clause of the Missouri statute making effective the timely remonstrance of a majority of the resident owners of property liable to taxation for a street improvement in disqualifying the Board of Aldermen from proceeding to authorize and contract for the improvement is, upon this record, a moot question.

Suppose this attempted check upon the power of the Board of Aldermen to legislate in respect to the improvement of city streets is void because the privilege or power of remonstrance is

conferred on residents alone, when it should have been conferred on all property owners. Then this clause or check upon the exercise of that legislative power comes out of the law. But, unless this clause, this check, is so intimately connected with the subject matter of the legislation that it cannot be presumed the legislature would have enacted the statute without the vicious provision, the remainder of the law will be preserved.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 326, opinion by Mr. Justice Brewer, it is said:

"It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently, of that beyond its power."

In *Huntington* v. *Worthen*, 120 U. S. 97, 102, Mr. Justice Field, speaking for the court, said:

"It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected."

The presumption is not to be indulged that the legislature of the state would have withheld the conference of power upon the numerous and growing cities of the fourth class in a great state to improve their streets unless that power were conditioned wholly upon the absence of a remonstrance from a majority of the resident owners of land abutting upon the street to be improved.

Indeed, power to so legislate is expressly conferred upon such cities in a different section of the statute from that containing the criticised words, in this language:

"The cities coming under the provisions of this article in their corporate capacity are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law. * * * Second: To open and *improve* streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and *exercise exclusive control over all streets,* alleys, avenues and public highways within the limits of such cities." R. S. Mo., 1899, Vol. 2, Sec. 5979.

It is a conceded fact that neither the complainant nor any other non-resident, or any property owner whatever, undertook to protest against the improvement. Is it to be assumed that if a substantial number of property owners had remonstrated to the Board of Aldermen of the city against the improvement that such voice would not have been effectual? At least no such effort was made and therefore no constitutional right was denied the complainant. The Chancellor before whom this case was tried disposed of this contention with this language:

"If the resolution or proceeding could be defeated by protest, and if complainant had the same right to protest, not by the statute, but under the Constitution as a resident owner had, then why did he not protest or offer to protest? And must he not do that or offer to do that which was required of a resident, before he can claim that he is denied equal protection? It seems clearly so to me, and a discussion of, or deciding the question, is wholly academic." (Transcript of Record, p. 518.)

V.

INTER-STATE COMMERCE NOT INVOLVED NOR UNLAWFULLY RESTRAINED.

Neither the allegations of complainant's bill, nor his proof in regard to the specification and use of Trinidad Lake asphalt as the material with which the paving contracts in question were executed, the defendant's ownership or control of that material and the source from which it was derived, bring the transaction within the ban of the Act of Congress of July 2, 1890, relative to monopolies, or the commerce clause of the Constitution of the United States.

The complainant charged in his bill that the defendant, the city engineer, the Board of Aldermen and Mayor of the City of Westport caused to be specified in the resolutions, ordinances and contracts for the paving in question that the pavement should consist of genuine Trinidad Lake asphalt; and this charge, coupled with the allegation that the defendant had the sole right to use the Trinidad Lake asphalt, a product alleged to be produced outside of the United States, constitute the ground for the conclusion

reached by him that the city and the defendant, at or near the dates alleged, monopolized or attempted to monopolize, combined and conspired with the city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states contrary to the Act of Congress of 1890.

Complainant's proof tends to show that defendant company did not own or control the source of supply of Trinidad Lake asphalt; that there were many companies using this material for paving purposes; that there were many other asphaltic cements on the market, thought by a witness to be equally as good for street paving purposes as the Trinidad Lake asphalt.

The City of Westport was by law obligated to keep its streets in repair. It alone had the power of determining when and with what material its streets should be paved, and of entering into contracts for such improvements. It was a city within the State of Missouri. The defendant Paving Company was a corporation, lawfully engaged in the business of laying Trinidad Lake asphalt street pavements within that state. The Paving Company, with commendable enterprise and diligence, brought to the attention of the property owners along the streets to be improved the good qualities of the kind of material it used in constructing street pavements. It, through its representatives, discussed with them its qualities of cleanliness, its endurance, its price and general adaptability and success as a pavement for city streets. And the property owners resident in the city, who were most vitally interested in having a good street pavement by reason of their ownership of property abutting on it, and because they would be required to pay for it, either of their own volition or upon the request of the representatives of the Paving Company, who had this material to sell, petitioned in writing the city authorities to cause the street to be paved with a Trinidad Lake Asphalt pavement of certain dimensions, the price of which should not exceed a stated sum, and which should be guaranteed to endure at least five years after completion. Such petitions, when executed and presented in good faith, and as the expression of the wishes and judgment of interested citizens in respect to a local public improvement such as this was, so far from being the subject of strictures and vituperative abuse, are to be commended as favorable to a wise corporate development and the exercise of a right guaranteed by the Constitutions of the United States and the State of Missouri. The officers of the municipality, doubtless in a measure influenced by the petition of property owners, in a measure by their knowledge of the merits of the paving material and the value of a guarantee, learned from the representatives of the parties having it to sell, and their own observation of the satisfactory char-

acter of the pavements made of it, adopted a resolution expressive of their own judgment that they deemed it necessary to pave the street to a stated extent and with a Trinidad Lake asphalt pavement. This resolution as to Wyandotte street was adopted July 15, 1897. (Transcript of Record, p. 171.) It was then published in the newspaper published in the city authorized to print such publications for ten days, and, after the lapse of more than ten days thereafter, during which time the owners of a majority in front feet of the lots abutting on the part of the street under consideration for improvement, might by remonstrance have disqualified the municipal authorities from ordering the improvement, when no person, not even complainant, offered any remonstrance or protest, the Mayor and Board of Aldermen on September 3, 1897, enacted an ordinance ordering the paving of the street conformable to the terms of the Declaratory Resolution. (Transcript of Record, p. 172.) Thereupon bids were solicited by advertisement for ten days, and in due time the bids of two competing companies were received, viz., the Barber Asphalt Paving Company and the Parker-Washington Paving Company. The proper authorities awarded the contract to defendant as the lowest and best bidder therefor, which contract was signed and duly confirmed by ordinance of the city on September 22, 1897 (Transcript of Record, p. 181), and the work was completed by the Paving Company before the levy of the assessment therefor on November 15, 1899. (Transcript of Record, p. 184.) Every act complained of from the drafting of the petitions for this improvement, including the entering into the contract and the completion of the work, and issuance and delivery of tax bills to pay the price of the work, was done within the limits of the City of Westport in the State of Missouri. The substance of the transaction inveighed against was the construction of a street pavement in that city. The tools and labor for the grading and rolling; the rock, sand and hydraulic cement are not charged or proved to have been acquired elsewhere than in that city; and there is no proof as to where defendant purchased or acquired ownership of the Trinidad Lake asphalt used in the work. As an incident only to that work it happened that the asphalt used as the matrix of the pavement at some time came from the island of Trinidad, off the coast of South America.

This transaction does not constitute commerce among the several states, or with foreign nations.

It has been held in *Pacific Express Co.* v. *Seibert*, 142 U. S., 339, opinion by Mr. Justice Lamar, that business done within a

state, although transacted by a corporation engaged in interstate business, was not interstate commerce.

It has been uniformly held in Missouri that the city authorities may select, designate and use materials for street paving purposes, although the same are patented and although the supply may be subject to the control of a monopoly. *Barber Asphalt Paving Co.* v. *Hunt,* 100 Mo., 22; *Warren* v. *Barber Asphalt Paving Co.,* 115 Mo., 572; *Verdin* v. *St. Louis,* 131 Mo., 26.

In the case last cited, which was determined on a demurrer to a petition, the petition charged that the Barber Asphalt Paving Company controlled Trinidad Lake asphalt; that there were other asphalts equally as good as the Trinidad Lake; that by specifying Trinidad Lake asphalt as the material to be used in the pavement, the price thereof was increased, etc. It was ruled by the court *in banc* that the petition in this respect did not state facts sufficient to constitute a cause of action to cancel tax bills issued in payment of the price of the work.

The official proceedings of the City of Westport, relative to paving its streets, the specifications for such pavements and the contracts then made between that city and a corporation authorized by law to conduct its business there, relative to paving its streets, and the execution of that work, although the material used in the work might at some time have come from a foreign state or nation, do not constitute interstate commerce.

In the leading case of *United States* v. *E. C. Knight Co.,* 156 U. S., 1, the Chief Justice in delivering the opinion said:

"It was in the light of well-settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. * * *

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. * * *

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacture does not determine the time when the article or product passes from the control of the state and belongs to commerce. This was so ruled in *Coe* v. *Erroll,* 116 U.

S., 517, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court said: 'Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the state of their origin to that of their destination.' * * *

"Contracts, combinations or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy."

In *Addyston Pipe & S. Co.* v. *United States*, 175 U. S., 211, opinion by Mr. Justice Peckham, it is said:

"The power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states. * * *

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the Federal power derived from the commerce clause in the Constitution."

In *Hopkins* v. *United States*, 171 U. S., 578, opinion by Mr. Justice Peckham, it is said:

"The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision. * *

"Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon, nor do they directly affect the subject of the transportation. * * *

"They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

"It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the land owners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the land owners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the land owners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the states? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because

horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad, not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion all these queries should be answered in the negative."

In the case of *Anderson* v. *United States*, 171 U. S., 604, opinion by Mr. Justice Peckham, it is said:

"Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S., 465, 473: 'There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

Attempts to monopolize or the act of monopolizing a part of the commerce among the states or foreign nations which promote, or only indirectly or incidentally restrict competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, are not intended to be and were not made illegal by the anti-trust act of July 2, 1890, because such attempts are indispensable to the existence of any competition in commerce among the states.

The terms of the Act of July 2, 1890, applicable to this controversy provide: Section 1. "Every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade, or commerce among the several states, or with foreign nations, is hereby declared to be illegal," etc.

Section 8 of Article 1 of the Constitution of the United States grants to Congress the exclusive power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The gravamen of complainant's grievance is that defendant persuaded the city, acting pursuant to a lawful grant of authority so to do, to specify a certain material with which certain streets should be paved, which material the defendant could furnish and which complainant charges defendant alone could furnish, and which was originally procured from a foreign nation and that such specified material was used in the pavement by defendant conformable to that specification and a contract therefor.

The act under consideration is to be given a reasonable and a common sense construction. It has been repeatedly ruled that persons having a commodity to sell, who were not engaged in rendering public or *quasi* public service, have the right to fix the price at which they will sell that commodity and to decline to sell it at any other price, and the right to fix the terms upon which a sale shall be made and to what persons it will sell, or will refuse to sell, and the territory within which the purchasers shall dispose of such merchandise. It was not the purpose of this act to deprive persons of any of these rights. One court have said, "If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade."

And in the same opinion it is said:

"But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Section 2 of the Act of July 2, 1890, 26 Stat., 209? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it and competition necessarily ceases—dies." *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep., 454.

In *United States* v. *Joint-Traffic Ass'n*, 171 U. S., 505, opinion by Mr. Justice Peckham, it is said: "In *Hopkins* v. *United States*, decided at this term, we have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. * * *

"To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

If complainant's construction of the statute, as applied to the facts of the case at bar, is adopted, the purpose and effect of the law will be adjudged to be to blight, restrain and suppress trade and commerce, rather than to promote and develop it. What transaction of barter or trade is accomplished unless at some stage of the negotiation the parties agree, combine, or conspire together that one shall furnish and deliver to the other some product or process of a defined and specific character which he controls or expects to procure? And is the transaction to be adjudged illegal because the product once came from one particular place rather than another, or by reason of the fact that the party engaged so to

do, alone can furnish it? Will anyone seriously argue that a municipality acting within the limits of the grant of its charter powers may not make a contract with a person or corporation to supply its workhouse with Pear's soap, or its hospital with Cream of Wheat from a designated manufacturer, or contract to use a certain paint of approved formula or manufacture? Is it to be argued that a few neighborly housewives cannot agree that they will each purchase a number of pounds of tea of a designated character of excellence produced in a foreign country, and give a joint order to their grocer to procure at a certain price the coveted delicacy for them without laying themselves liable to a fine of five thousand dollars and imprisonment for a violation of the anti-trust law?

Take the instance of a public building: If a person, having a quarry lying without the United States from which is produced a marble or granite particularly adapted as to the qualities of durability and beauty for such structures, goes before the supervising architect or the controlling authorities and by bona fide and honest representations of the character of his material induces them, in the exercise of the discretionary power with which they are invested, to specify and order the building to be constructed of that material, and to advertise for bids for the work according to those specifications, and he then becomes the successful bidder and enters into a contract to build the structure as specified and he completes it with the material designated and it is accepted by the proper authority as having been executed according to contract, is it to be held that that person is then to be defeated in the recovery of the contract price of the building, and is liable to a fine and imprisonment because the transaction, taken as a whole, is a combination or conspiracy between the contractor and the public officials and is violative of the Federal law relative to monopolizing foreign or inter-state commerce?

It would seem to one disinterestedly considering the effect of such a purpose and transaction as are described in the bill of complaint, that the successful attempt of the Paving Company to procure a contract with the City of Westport to pave its streets with Trinidad Lake asphaltum and the execution of that contract, promoted and enlarged commerce between the states and foreign nations more than would have occurred had some denizen of the municipality procured a contract to pave the same streets with rock or brick taken from within the limit of the town itself. And so it is with all such efforts to sell products by those actively engaged in the vocation of making or distributing subjects of trade. The record shows that complainant endeavored to establish that there were many other kinds of asphalt successfully used in street paving, which, if the

city authorities had deemed it wise to do so, might have been adopted and used for the improvements in contemplation. In the exercise of the discretion by law vested in them, the municipal authorities designated a particular kind of material. This was forthcoming through the usual channels of trade and the streets were paved. The logic of complainant's contention is they should have designated *all* kinds of materials, in which event, doubtless, no pavements would have been laid.

The proposition involved in this contention has been thoughtfully considered and decided by a unanimous court in the Circuit Court of Appeals for the Eighth Circuit in the case of *Whitwell* v. *Continental Tobacco Company*, 125 Fed. Rep., 454. And again by the same court in *Phillips* v. *Iola Portland Cement Company*, 125 Fed. Rep., 593. In the latter case in the opinion by Sanborn, C. J., it is said:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins* v. *U. S.*, 171 U. S., 578, 592; *Anderson* v. *U. S.*, 171 U. S., 604, 616; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S., 505, 568; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211, 245; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290; *U. S.* v. *Northern Securities Company*, 120 Fed., 721."

We respectfully submit in behalf of the Barber Asphalt Paving Company (1) that the Circuit Court of the United States for the Western Division of the Western District of Missouri was without jurisdiction in this cause and that the judgment of that court should be reversed and complainant's bill dismissed; (2) the

earned court erred in adjudging and decreeing that the contract nd official proceedings relative to the pavement of Wyandotte treet in the City of Westport were illegal and void because the treet had, about five years previously to the laying of the asphalt avement under the contract referred to, been macadamized, when he complainant's bill did not allege that the ordinance was unreas- nable or confiscatory, and when the proof did not warrant that conclusion for the reason stated or for any other reason; and that he decree of the court in that respect should be modified so as to leny the complainant any relief; (3) that there is no merit in the complainant's appeal.

Respectfully submitted,

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APPENDIX.

The following sections of the General Statutes of Missouri relating to cities of the fourth class embrace all the provisions of that law relative to the power of those cities to pave streets and to issue tax bills to pay the price of such pavements, and they include Sections 85 to 95 inclusive of the Act of the General Assembly of the state relative to cities of the fourth class, approved April 11, 1895. Laws of Mo., 1895, p. 65.

R. S. Mo. 1899, *Vol. 2, Sec.* 1579. *Empowering board to levy tax for general revenue—open streets, etc.* The cities coming under the provisions of this article, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law:

First: To levy and collect taxes for general revenue purposes on all mixed, personal and real property within the limits of said city, taxable according to the laws of this state.

Second: To open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city.

Sec. 5980. *Street grading, etc., paid for by city.*—The cost of bringing to grade all streets, avenues, alleys and other highways, and for the building of bridges, culverts, public sewers and footwalks across streets, avenues, alleys and other public highways, shall be paid out of the general revenue fund of the city.

Sec. 5982. *Macadamizing, etc., of streets charged to abutting property.*—The cost of paving, macadamizing, guttering and curbing (where such curb is set out into the street beyond the sidewalks) all streets, avenues, alleys and other highways, or any part thereof or any connection therewith, and repairing the same, and for doing all excavating and grading necessary for the same, after said streets, avenues, alleys and other highways, or parts thereof or connections therewith, have been first brought to grade, as hereinbefore provided, shall be levied as a special assessment upon all lots and pieces of ground upon either side of such street, avenue, alley or other highway, or part thereof or connection therewith, abutting thereon, along the distance improved, in proportion to the front foot.

Sec. 5983. *Paving squares and street-crossings—how paid for.*—The cost of paving or macadamizing the squares and areas as formed by the crossing or meeting of streets and other highways, or parts thereof or connections therewith, shall be levied as a special assessment and paid for as follows: Such area shall be divided into parts or portions by lines drawn lengthwise along the middle of each of said streets or highways so intersecting or meeting, and the cost of said parts or portions shall be levied as a special assessment against the block or square contiguous to each, and prorated against the lots or pieces of ground in such block or square abutting on the street improved.

Sec. 5984. *Tax-bills to issue for street improvements.*—The assessments made for making and repairing sidewalks and sidewalk curbing, and for paving, macadamizing, curbing and guttering all streets, avenues, alleys and other highways, and repairing the same, as herein provided, shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax-bill shall issue therefor, and shall be paid in the same manner provided by ordinance. Said special tax-bills may bear interest after thirty days from the date of issue at the rate of eight per cent. per annum, and every such special tax-bill shall be a lien against the lot or piece of ground described in the same until the same is paid.

Sec. 5985. *Estimate to be made before work is ordered done.*—Before the board of aldermen shall make any contract for building bridges, sidewalks, culverts or sewers, or for paving, macadamizing, curbing, guttering or grading any street, avenue, alley or other highway, an estimate of the cost thereof shall be made by the city engineer or other proper officer and submitted to the board of aldermen, and no contract shall be entered into for any such work or improvement for a price exceeding such estimate: Provided; that no such estimate shall be required for the making of any local or special repairs.

Sec. 5986. *City may sue on tax-bills.*—All special tax-bills issued for special assessments for paving, macadamizing, curbing, guttering, excavating, grading, construction of sidewalks, and for district sewers, and for any other purpose whatever authorized by this article, shall be assignable and collectable in any action brought in the name of the city to the use of the holder thereof; but the city shall not in any event be liable for any cost that may accrue in such action. Such special tax-bills shall, in any action thereon, be prima facie evidence of the regularity of the proceedings for such special assessment, of the validity of the bill, of the doing of the work and of the furnishing of the materials charged

for, and of the liability of the property to the charge stated in the bill.

Sec. 5987. *Tax-bills to be paid in three annual payments, when.*—The total cost of paving, macadamizing, curbing, guttering and the necessary excavation and grading for the same, of any street, avenue, square or alley, or other highway or any part thereof, may be paid in three annual payments, one-third in one year, one-third in two years and one-third in three years from the date of issue of the special tax-bills, each payment to bear not to exceed eight per cent. interest per annum from date of issue to date of payment: Provided, that the owner of any lot or parcel of ground fronting on such street, avenue, alley or other highway, or square or part thereof improved, shall, within thirty days after the letting of the contract for such work, notify the city clerk, in writing, that he desires to pay the same in three annual payments. In such cases the city clerk, engineer or other proper officer shall make out three special tax-bills, which shall be signed by the mayor and attested by the city clerk, each for one-third part of the cost of such work, bearing interest as aforesaid, which rate shall be fixed by ordinance, and deliver the same to the contractor for the work. Each and every such tax bill shall be a lien on the lot or parcel of ground therein described, and such lien shall continue for one year from the maturity of the tax-bills last becoming due, until paid, or until the final determination of any legal proceedings to collect the same; but no such suit shall be brought on any such tax-bill until after the maturity of all such tax-bills.

Sec. 5989. *Notice of intention to improve streets to be published—Tax-payers may protest—Contract to be let to lowest bidder—Sidewalks repaired without notice—Contractor, how paid.*—When the board of aldermen shall deem it necessary to pave, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution, declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided; and the finding of the board that a majority of such

owners have not filed protest, shall be conclusive and final. No such publication shall be necessary for the making of any sidewalks, but upon petition of any ten citizens of the city the board of aldermen shall have power to make contracts for the construction of sidewalks, including grading therefor, with or without curbing, along any street, avenue or other public highway, or any part thereof whatever. Such contract shall be let to the lowest and best bidder, upon plans and specifications filed therefor by the city engineer or other officer designated by the board of aldermen, with the city clerk, not less than one week's advertisement for bids thereupon being made in some newspaper published in the city. When upon proper advertisement no bid is received, the board of aldermen may proceed as provided in section 5992. No formality whatever shall be required to authorize the repairing of sidewalks, or of street or other paving, curbing, guttering, macadamizing, or part thereof, or reconstructing the same, and making assessments therefor, but the proper officer or committee on improvements may, without notice, cause such work to be done, keeping an account of the cost thereof, and reporting the same to the board of aldermen for assessment; and each lot or piece of ground abutting on such sidewalk, street, avenue or alley, or part thereof, shall be liable for its part of the cost of such work made along or in front of such lot or piece of ground, as reported to the board of aldermen. The board of aldermen may provide a penalty for failure to pay such special tax within a given time, and any tax-bills issued in payment of such repairs shall constitute a lien upon the property liable therefor until paid. All costs for building and constructing sidewalks shall be paid to the contractor therefor, in special tax-bills, assessed against the abutting property liable therefor, and such tax-bills shall constitute a lien upon such property until paid, and shall bear interest at eight per cent. per annum from date of issue, except as provided in section 5992.